TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1908

No. 91

SAMUEL PRELA, TRADING AS SELWELL BLOUSE COMPANY, PETITIONER,

vs.

LOUIS HUBSHMAN, TRUSTEE IN BANKRUPTCY OF SAMUEL PRELA, TRADING AS SELWELL BLOUSE COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 13, 1908

CERTIORARI GRANTED APRIL 13, 1908

(33,289)

summary proceeding, the question
of fraudulent concealment - being involved
the evidence showed clearly established the
facts otherwise the order is not warranted -
The failure to comply is not in controversy.
In the contempt proceeding the court heard
that it is not necessary to hear but again
the question of wealth holding of assets
The evidence that is sufficient to warrant
the order is sufficient to warrant

(33,289)

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[fol. 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

#38079

In the Matter of SAMUEL PRELA, Trading as Selwell Blouse Company, Bankrupt

In Bankruptcy

MEMORANDUM OPINION OF REFEREE

Referee's Memorandum on Turn-over Motion

From the first of September, 1924, till the date of the filing of the petition in bankruptcy herein on or about November 22, 1924, bankrupt Prela purchased 14,434½ yards of silk. This silk was presumably bought by bankrupt to manufacture blouses, his stock in trade. I find that the kind of blouses manufactured by bankrupt in the ordinary course of trade required 1½ yards of material per blouse. The average price paid per yard was $1.39.

During the period in question bankrupt sold 4,622 blouses and there were on hand at the time of the bankruptcy 465 blouses. Total to be accounted for 5,087 blouses.

Upon the above basis the material necessary to manufacture 5,087 blouses is 7,630½ yards. To this should be added 679¾ yards silk on hand at date of bankruptcy, making a total of 8,310¼ yards. Deducting 8,310¼ yards [fol. 2] accounted for from the 14,434½ yards purchased, leaves 6,124½ yards unaccounted for. Reducing this to dollars at $1.39 per yard, leaves $8,512.70 unaccounted for. There was also on hand at the date of the bankruptcy in addition to silk yardage 24¾ yards of velvet. It does not appear whether or not the silk yardage of 14,434½ purchased includes velvet. Assuming it does and that bankrupt should be credited with this 24¾ yards of velvet, there was no evidence as to the value of this velvet but it could not have exceeded $125 in value. An additional credit of $125 will be given bankrupt and this amount deducted from

$8,512.70, leaving $8,387.20 for which bankrupt has failed to account for and I find is concealing.

Bankrupt's attempted explanation was based on his own uncorroborated and discredited testimony that he was during the period in question manufacturing mainly tunics and not blouses. It appeared to my satisfaction that tunics required more material than blouses. I do not believe bankrupt's testimony in this connection and I find that trustee has sustained the burden of proving a concealment of $8,387.70 worth of silks which, or the equivalent in money, bankrupt should be directed to turn over.

Bankrupt in September, 1924 received from the Equitable Life Assurance Society, the sum of $436.04, representing proceeds of check received from said Society. Bankrupt's explanation of what he did with the proceeds of this check which he cashed with a friend is to my mind entirely unsatisfactory and unconvincing.

{fol. 3} Bankrupt in April, 1924, received $1,460.74, the proceeds of checks received from the Travelers' Insurance Company. These checks were by bankrupt turned over to his wife. Bankrupt undertook to testify that his wife spent it, that she was sick and went away to the country for a few weeks and she spent it. Bankrupt's wife was the obvious person to explain what she did with the money. Yet, though no reason was shown why it was not perfectly possible and feasible to do so, bankrupt's wife was not called as a witness. Bankrupt's explanation as to this $1,460.74 is also entirely unsatisfactory and unconvincing.

I accordingly find that in addition to the $8,387.70, bankrupt is also concealing the aggregate of the insurance checks, namely, $1,896.78.

Upon proof that bankrupt was insured at the time of bankruptcy by life insurance policies having cash surrender values constituting assets of this estate in bankruptcy, an order will be made directing bankrupt to execute such papers as are necessary to enable trustee in bankruptcy to collect said cash surrender value.

Settle order on notice.

Dated New York, June 30, 1926.

Peter B. Olney, Jr., Referee.

[fol. 4] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER OF REFEREE ENJOINING BANKRUPT—July 8, 1926

Louis Hubshman, the Trustee herein, having made an application to compel Samuel Prela, trading as the Selwell Blouse Co., the bankrupt above named, to turn over to his Trustee, the following money and property belonging to his estate, alleged to be in the possession and control of the said bankrupt, and which the said bankrupt is fraudulently concealing from his said Trustee, to wit:

1. Goods, wares and merchandise consisting of 6,124¼ yards of silk, of the average value of $1.39 per yard, valued at upwards of $8,512.70, or the proceeds of the sale thereof, for which the bankrupt has failed to account.

2. Cash in the sum of $436.04, representing the proceeds of check received by the bankrupt from the Equitable Life [fol. 5] Assurance Society on or about September 26th, 1924, dated September 26th, 1924, and retained by said bankrupt.

3. Cash in the sum of $1,400.74, representing the proceeds of four checks for $405.59, $130.06, $650.29, and $214.86 each, respectively, received by the bankrupt from the Travelers Insurance Company, on or about April 24th, 1924.

4. The cash surrender value of the following policies of insurance upon the life of the bankrupt:

Policy #533979, issued by the Travelers Insurance Company, surrender value on date of adjudication in bankruptcy, $166.63;

Policy #664133, issued by the Travelers Insurance Company, surrender value on date of adjudication in bankruptcy, $73.13;

Policy #1896717, issued by Equitable Life Assurance Society, surrender value on date of adjudication in bankruptcy, $43.27.

5. All other moneys and property that the bankrupt has received and has not accounted for;

and the said Samuel Prela, trading as the Selwell Blouse Co., having filed his verified answer thereto, and the matter [fol. 6] having been duly heard, and testimony taken, and the Referee having rendered a decision thereon,

Now, upon reading and filing the petition of Louis Hubshman, verified the 1st day of July, 1925; the order of Peter B. Olney, Jr., Referee in Bankruptcy, dated July 3d, 1925; the answer of the bankrupt herein, verified the 16th day of July, 1925; the testimony, and the opinion of the Court; and all proceedings had herein; and after hearing George L. Cohen, Esq., Attorney for the said Trustee, in support of the said petition; and Steinberg & Levin, Esqs., by Louis H. Levin, of counsel, attorneys for the bankrupt, in opposition thereto; and due deliberation having been had thereon, it is, on motion of George L. Cohen, Esq., attorney for the said Trustee,

Ordered that the prayer of the Trustee's petition herein be, and it hereby is granted to the extent hereinafter set forth; and it is further

Ordered that the said Samuel Prela, trading as the Selwell Blouse Co., the bankrupt herein, account for and pay over within ten (10) days, to Louis Hubshman, his Trustee herein, the following goods, wares and merchandise, and money belonging to his estate in bankruptcy, and found to be in his possession, or under his control, and found to be concealed by him, to wit:

1. Goods, wares and merchandise, consisting of 6,099¼ yards of silk, or the sum of $8,387.20, as the cash value thereof.

[fol. 7] 2. Cash in the sum of $436.04, representing proceeds of a check received by the bankrupt from the Equitable Life Assurance Society on or about September 26th, 1924.

3. Cash in the sum of $1,400.74, representing the proceeds of four checks for $405.59, $130.06, $650.29 and $214.80, each, respectively, received by the bankrupt from the Travelers Insurance Company on or about April 24th, 1924;

and it is further

Ordered that the bankrupt be, and he hereby is forbidden and enjoined from in any manner conveying, trans-

ferring, assigning or encumbering any of the above described property or money.

Dated New York, July 8th, 1926.

Peter B. Olney, Jr., Referee in Bankruptcy.

[fol. 8] In United States District Court

[Title omitted]

Order Confirming Order of Referee—November 9, 1926

Louis Hubshman, the Trustee herein, having moved this Court by a notice of motion dated August 20th, 1926, for an order in all respects confirming the order of Hon. Peter B. Olney, Jr., Referee in Bankruptcy, dated July 8th, 1926, filed herein; and for an order denying and dismissing the petition for review verified July 20th, 1926, and filed herein on behalf of the bankrupt above named; and said motion having duly come on to be heard; and upon reading and filing the certificate of Hon. Peter B. Olney, Jr., Referee in Bankruptcy, dated August 17th, 1926; the said petition verified July 20th, 1926; the order of Hon. Peter B. [fol. 9] Olney, Jr., Referee, dated July 9th, 1926; the petition of Louis Hubshman, verified July 1st, 1925; and the order to show cause granted thereon; the answer of the bankrupt thereto, verified July 16th, 1925; the Referee's memorandum of opinion dated June 30th, 1926; the stenographic record of the proceedings before the said Referee in connection with the said matter; and upon all of the papers heretofore filed herein; and upon the proceedings had herein; and after hearing George L. Cohen, Esq., attorney for the Trustee, in support of said motion; and Louis H. Levin, Esq., counsel for the bankrupt, in opposition thereto; and on reading and filing the opinion of this Court; and due deliberation having been had thereon,

Now, on motion of George L. Cohen, Esq., attorney for Louis Hubshman, the Trustee herein, it is

Ordered that the said motion made on behalf of the Trustee, be, and the same hereby is in all respects granted; and it is further

Ordered that the order of Hon. Peter B. Olney, Jr., Referee in Bankruptcy, dated July 8th, 1926, be, and the

same hereby is in all respects confirmed; and it is further

Ordered that the petition for review, verified July 20th, 1926, filed on behalf of the bankrupt, be, and the same hereby is dismissed; and it is further

[fol. 10] Ordered that Samuel Prela, formerly trading as the Selwell Blouse Company, the bankrupt above named, account for and pay over within ten (10) days, to Louis Hubshman, his Trustee herein, the following goods, wares and merchandise and money belonging to his estate in bankruptcy, and found to be in his possession or under his control, and found to be concealed by him, to wit:

1. Goods, wares and merchandise, consisting of 6,099¼ yards of silk, or the sum of $8,387.20, as the cash value thereof.

2. Cash in the sum of $436.04, representing proceeds of a check received by the bankrupt from the Equitable Life Assurance Society on or about September 26th, 1924.

3. Cash in the sum of $1,400.74, representing the proceeds of four checks for $405.59, $130.06, $650.20 and $214.80, each, respectively, received by the bankrupt from the Travelers Insurance Company on or about April 24th, 1924;

and it is further

Ordered that the said bankrupt be, and he hereby is enjoined from in any manner conveying, transferring, assigning or encumbering any of the aforesaid property or money.

F. A. Winslow, District Judge.

[fol. 11] In United States District Court

[Title omitted]

Report and Certificate of Referee.—April 13, 1927

To the United States District Court for the Southern District of New York:

I, Peter B. Olney, Jr., the Referee in the above entitled matter, do respectfully certify:

1. That on the 8th day of July, 1926, I made an order requiring and directing Samuel Prela, the bankrupt herein,

"to account for and pay over within ten (10) days, to Louis Hubshman, his Trustee herein, the following goods, wares and merchandise, and money belonging to his estate in bankruptcy, and found to be in his possession, or under his control, and found to be concealed by him, to wit:

1. Goods, wares and merchandise, consisting of 6,099½ yards of silk, or the sum of $8,387.20, as the cash value thereof.

[fol. 12] 2. Cash in the sum of $436.04, representing proceeds of a check received by the bankrupt from the Equitable Life Assurance Society on or about September 26th, 1924.

3. Cash in the sum of $1,400.74, representing the proceeds of four checks for $405.59, $130.06, $650.29 and $214.80, each, respectively, received by the bankrupt from the Travelers Insurance Company on or about April 24th, 1924."

II. That on July 21st, 1926, the Trustee and I were served with a petition for review, verified by the bankrupt on July 20th, 1926.

III. That thereafter, I certified the question to the United States District Court.

IV. That the Trustee made a motion to dismiss the petition for review and to confirm my order of July 8th, 1926.

V. That this motion was argued before Hon. Francis A. Winslow, one of the Judges of the United States District Court, on October 27th, 1926, and was decided in favor of the Trustee.

VI. That pursuant to such decision an order was entered on the 9th day of November, 1926, confirming my order of July 8th, 1926, dismissing the petition for review and ordering that "the bankrupt herein, account for and pay over within ten (10) days, to Louis Hubshman, his Trustee [fol. 13] herein, the following goods, wares and merchandise, and money belonging to his estate in bankruptcy, and found to be in his possession, or under his control, and found to be concealed by him, to wit:

1. Goods, wares and merchandise, consisting of 6,099½ yards of silk, or the sum of $8,387.20, as the cash value thereof.

2. Cash in the sum of $436.94, representing proceeds of a check received by the bankrupt from the Equitable Life Assurance Society on or about September 26th, 1924.

3. Cash in the sum of $1,400.74, representing the proceeds of four checks for $405.59, $130.06, $650.29, and $124.80, each, respectively, received by the bankrupt from the Travelers Insurance Company on or about April 24th, 1924."

VII. That as appears by the affidavit of James D'Agostino, sworn to the 22d day of January, 1927, said order, signed by Judge Francis A. Winslow, dated November 9th, 1926, was served upon Samuel Prela, the bankrupt herein, on the 18th day of January, 1927.

VIII. That thereafter the bankrupt made a motion to the Circuit Court of Appeals for leave to appeal to that Court, which came on to be heard before Judges Hough, Mack and Learned Hand on December 6th, 1926, and after [fol. 14] bankrupt submitted an assignment of errors and after argument, the judges unanimously decided that the application for leave to appeal be denied, the said application was denied and an order entered December 13th, 1926.

IX. That thereafter the bankrupt made an application to Hon. Francis A. Winslow, Judge of the United States District Court, for a rehearing and, after due consideration, this application was denied and an order made and filed denying said application.

X. That as appears by the affidavit of Louis Hulshman, Trustee, the bankrupt, Samuel Prela, has failed to comply with said order.

XI. That the time to comply with said order has now expired.

I therefore find that said Samuel Prela is in contempt of Court, and therefore recommend that he be punished for contempt for failing to comply with the terms of the order of the United States District Court dated Novem

ber 9th, 1926, by his failure to turn over to the said Trustee the following goods, wares and merchandise, and money belonging to this estate in bankruptcy, and found to be in his possession, or under his control, and found to be concealed by him, to wit:

1. Goods, wares and merchandise, consisting of 6,099½ yards of silk, or the sum of $8,387.20, as the cash value thereof.

[fol. 15] 2. Cash in the sum of $436.04, representing proceeds of a check received by the bankrupt from the Equitable Life Assurance Society on or about September 26th, 1924.

3. Cash in the sum of $1,400.74, representing the proceeds of four checks for $405.59, $130.06, $650.29 and $214.80, each, respectively, received by the bankrupt from the Travelers Insurance Company on or about April 24th, 1924.

All of which is respectfully submitted.

Dated New York, April 13th, 1927.

Peter B. Olney, Jr., Referee in Bankruptcy.

[fol. 16] In the United States District Court

[Title omitted]

State of New York,
County of New York, ss:

Louis Hubshman, being duly sworn, deposes and says:

That on the 20th day of January, 1925, I was duly elected Trustee herein, and that I duly qualified and am now acting as such.

That on the 18th day of January, 1927, the bankrupt, Samuel Prela, was served with an order of the United States District Court, signed by Judge Francis A. Winslow, dated November 9th, 1926, as appears by the affidavit of James D'Agostino, sworn to the 22nd day of January, 1927.

That, among other directions, the aforesaid order reads as follows:

[fol. 17] "Ordered that Samuel Prela, formerly trading as the Selwell Blouse Company, the bankrupt above named, account for and pay over within ten (10) days, to Louis Hubshman, the Trustee herein, the following goods, wares and merchandise and money belonging to his estate in bankruptcy, and found to be in his possession or under his control, and found to be concealed by him, to wit:

1. Goods, wares and merchandise, consisting of 6,669½ yards of silk, or the sum of $8,370.20, as the cash value thereof.

2. Cash in the sum of $436.04, representing proceeds of a check received by the bankrupt from the Equitable Life Assurance Society on or about September 26th, 1924.

3. Cash in the sum of $1,480.74, representing the proceeds of four checks for $406.50, $130.06, $650.20 and $214.80, each, respectively, received by the bankrupt from the Travelers Insurance Company on or about April 24th, 1924."

That the time of Samuel Prela to comply with the said order has now expired. That the said Samuel Prela has not complied with the aforesaid order in that he has failed to turn over to me or to George Lion Cohen, Esq., as attorney for Trustee, or to any other person on his, mine or our [fol. 18] behalf, any of the aforementioned items or the cash value thereof.

Louis Hubshman.

Sworn to before me this 11th day of April, 1927. Arthur H. Eschenfield, Commissioner of Deeds, City of New York, Residing in Queens County. Register No. 2889, Co. Clk's No. 21. Commission expires Jan. 25, 1929.

In the United States District Court

[Title omitted]

Affidavit of Service

James D'Agostino, being duly sworn, deposes and says that he is over the age of 21 years; that on the 18th day of January, 1927, at No. 1655 Union Street, Borough of [fol. 19] Brooklyn, City of New York, he served an order of this Court, dated November 9th, 1926, and signed by Judge Francis A. Winslow upon Samuel Prela, the bankrupt in this proceeding, by delivering to and leaving personally with the said Samuel Prela, a certified copy thereof.

Deponent further says that he knew the person served as aforesaid to be Samuel Prela, the bankrupt mentioned and described in said order.

James D'Agostino.

Sworn to before me this 22nd day of January, 1927. Joseph J. Freeman, Notary Public. Bronx Co. Clerk's No. 86. Bronx Co. Reg. No. 2760. N. Y. Co. Clerk's No. 327. N. Y. Co. Reg. No. 7263. Kings Co. Clerk's No. 23. Kings Co. Reg. No. 7172. Queens Co. Clerk's No. 1653, Richmond County. My term expires Mar. 30, 1927.

[fol. 20] In United States District Court

[Title omitted]

Order to Show Cause—May 12, 1927

On reading the annexed petition of Louis Hulshman, the Trustee herein, verified the 22nd day of April, 1927; and the affidavit of George Lion Cohen, Esq., sworn to the 12th day of May, 1927; and upon the report of Hon. Peter B. Olney, Jr., Referee herein, dated April 13th, 1927, heretofore filed herein; and upon all of the papers and proceedings heretofore had herein; and on motion of George Lion Cohen, Esq., attorney for the Trustee, it is

Ordered that Samuel Prela, the bankrupt herein, personally appear before me or one of the Judges of this Court, and show cause at a Stated Term of the United States District Court for the Southern District of New York for motions, to be held at the Old Post Office Building in the City of New York, Borough of Manhattan, Room #235 thereof, on the 22nd day of June, 1927, at 10:30 A. M., on that day, and on such further days as I or one of [fol. 21] the Judges of this Court shall name, why an order should not be made and entered herein adjudging and determining that the report of Hon. Peter B. Olney, Jr., Referee herein, dated April 13th, 1927, filed herein, be in all respects confirmed; and why the said bankrupt, Samuel Prela, should not be found guilty of a contempt of this Court in having wilfully and deliberating disobeyed the lawful order of this Court, dated November 9th, 1926, and in neglecting and refusing, as in said order directed, to pay over to the said Trustee the following goods, wares and merchandise and money belonging to his estate in bankruptcy, and found to be in his possession or under his control, and found to be concealed by him, to wit:

1. Goods, wares and merchandise, consisting of 6,666½ yards of silk, or the sum of $8,387.20, as the cash value thereof.

2. Cash in the sum of $426.04, representing proceeds of a check received by the bankrupt from the Equitable Life Assurance Society on or about September 26th, 1924.

3. Cash in the sum of $1,400.74, representing the proceeds of four checks for $405.59, $130.06, $650.29 and $214.80, each, respectively, received by the bankrupt from the Travelers Insurance Company on or about April 24th, 1924,

and why an order should not be made forthwith directing that the said Samuel Prela, bankrupt, be forthwith arrested [fol. 22] by the Marshal of this District, and brought before this Court forthwith, or as soon thereafter as possible, to be committed as and for the contempt aforesaid, and be imprisoned by the United States Marshal for the Southern District of New York until he shall obey the order to pay over to the said Trustee the said goods, wares and merchandise and money above set forth, in the sum of $10,

223.98, as directed in said order, or until further order of this Court; and why the Trustee herein should not have such other and further relief as to this Court may seem just and proper.

Further ordered that the service of a copy of this order and of the petition and affidavit thereto annexed, on or before the 14th day of June, 1927, be deemed sufficient service.

Dated New York, May 12th, 1927.

Henry W. Goddard, United States District Judge.

[fol. 23] In United States District Court

[Title omitted]

Petition of Louis Hubshman

To the United States District Court for the Southern District of New York:

The petition of Louis Hubshman, the Trustee herein, respectfully shows:

First. That on the 8th day of July, 1926, Hon. Peter B. Olney, Jr., Referee in Bankruptcy, the Referee in the above entitled matter, made an order requiring and directing the said Samuel Prela, the bankrupt herein, "to account for and pay over within ten (10) days, to Louis Hubshman, his Trustee herein, the following goods, wares and merchandise, and money belonging to his estate in bankruptcy, and found to be in his possession, or under his control, and found to be concealed by him, to wit:

1. Goods, wares and merchandise, consisting of 6,999½ yards of silk, or the sum of $8,387.20, as the cash value thereof.

[fol. 24] 2. Cash in the sum of $436.04, representing proceeds of a check received by the bankrupt from the Equitable Life Assurance Society on or about September 26th, 1924.

3. Cash in the sum of $1,400.74, representing the proceeds of four checks for $405.59, $130.06, $650.29 and $214.80,

each, respectively, received by the bankrupt from the Travelers Insurance Company on or about April 24th, 1924."

Second. That on July 21st, 1926, the Referee and your petitioner were served with a petition for review verified by the bankrupt on July 20th, 1926.

Third. That thereafter the said Referee certified the question to the United States District Court.

Fourth. That thereafter the Trustee made a motion to dismiss the petition for review, and to confirm the order of the Referee dated July 8th, 1926.

Fifth. That this motion was argued before Hon. Francis A. Winslow, one of the Judges of the United States District Court, on the 27th day of October, 1926, and was decided in favor of the Trustee.

Sixth. That pursuant to such decision of Hon. Francis A. Winslow, an order was entered on the 9th day of November, 1926, confirming the order of Hon. Peter B. Olney, Jr., [fol. 25] Referee, dated July 8th, 1926, dismissing the petition for review, and ordering that "the bankrupt herein, account for and pay over within ten (10) days, to Louis Hulshman, his Trustee herein, the following goods, wares and merchandise, and money belonging to his estate in bankruptcy, and found to be in his possession, or under his control, and found to be concealed by him, to wit:

1. Goods, wares and merchandise, consisting of 6,000½ yards of silk, or the sum of $8,787.20, as the cash value thereof.

2. Cash in the sum of $426.04, representing proceeds of a check received by the bankrupt from the Equitable Life Assurance Society on or about September 26th, 1924.

3. Cash in the sum of $1,408.74, representing the proceeds of four checks for $405.20, $120.06, $650.28 and $214.80, each, respectively, received by the bankrupt from the Travelers Insurance Company on or about April 24th, 1924."

Seventh. That, as appears by the affidavit of James D'Agostino, sworn to the 22nd day of January, 1927, a cer-

tified copy of the said order signed by Judge Francis A. Winslow, dated November 9th, 1926, was served upon Samuel Prela, the bankrupt herein, on the 18th day of January, 1927.

Eighth. That thereafter the bankrupt made a motion to the [fol. 26] Circuit Court of Appeals for leave to appeal to that Court, which came on to be heard before Judges Mack, Hough and Learned Hand on the 6th of December, 1926, and after the bankrupt had submitted an assignment of alleged errors, and after argument, the judges unanimously decided that the application for leave to appeal be denied, and the said application was denied, and an order entered December 13th, 1926.

Ninth. That thereafter the bankrupt made an application to Hon. Francis A. Winslow, Judge of the United States District Court, for a rehearing, and after due consideration, this application was denied, and an order made and filed denying the said application.

Tenth. That the time of the said Samuel Prela to comply with the said order has expired, and the said Samuel Prela has not complied with the aforementioned order, and that he has failed to turn over to your petitioner as Trustee, or to his attorney, George Lion Cohen, Esq., or to any other person in behalf of your petitioner, any of the aforementioned property or cash value thereof.

Eleventh. That heretofore and on or about the 13th day of April, 1927, Hon. Peter B. Olney, Jr., the Referee herein, made his report which was filed herein, in which the said Referee finds that the said Samuel Prela is in contempt of Court, and recommends that he be punished for contempt [fol. 27] for his failure to comply with the order of the United States District Court dated November 9th, 1926, by his failure to turn over to his Trustee the aforesaid goods, wares and merchandise, and money belonging to his estate in bankruptcy, and found to be in his possession, or under his control, and found to be concealed by him.

Twelfth. That no previous application for the relief herein prayed for has been made to any court or judge.

Wherefore petitioner prays that an order may be entered herein adjudging and determining that the report of the Referee herein, dated April 13th, 1927, be in all respects confirmed; that the said bankrupt, Samuel Prela, be adjudged and determined guilty of a contempt of this Court in having wilfully and deliberately disobeyed a lawful order of this Court, and in neglecting and refusing, as in said order directed, to pay over to his Trustee goods, wares and merchandise, and money of the aggregate sum of Ten Thousand Two Hundred Twenty three and 98 100 ($10,223.98) Dollars, as directed in said order; and that the Marshal of this District be directed to forthwith arrest the said bankrupt as and for the contempt aforesaid; and that the said bankrupt be imprisoned by the said United States Marshal for the Southern District of New York, until he shall obey the said order, and pay over to your petitioner, as Trustee, the sum of Ten Thousand Two Hundred Twenty-three and 98 100 ($10,233.98) Dollars, as [fol. 28] therein directed; and for such other and further relief as to this Court may seem just and proper.

Dated New York, April 22nd, 1927.

Louis Hubshman, Petitioner.

Duly sworn to by Louis Hubshman. Jurat omitted in printing.

[fol. 29] In United States District Court

[Title omitted]

Affidavit of George Lion Cohen

State of New York,
County of New York, ss:

George Lion Cohen, being duly sworn, deposes and says: I am an attorney and counselor at law, and the attorney for the Trustee herein. That upon the annexed petition an order was duly made by Hon. F. A. Winslow, United States District Judge, on or about the 23rd day of April, 1927, returnable May 11th, 1927, but that the said order could

not be served upon the bankrupt because the said bankrupt was evading service.

Wherefore deponent respectfully prays that the order annexed hereto be granted.

That, except as aforesaid, no previous application has been made.

George Lion Cohen.

Sworn to before me this 12th day of May, 1927. Max Alter, Notary Public. N. Y. Cl'k's No. 147. Reg. No. 9075. Kings Co. Cl'k's No. 8. Reg. No. 9071. Bronx Co. Cl'k's No. 9. Reg. No. 2935. Queens Co. Cl'k's No. 1268. Reg. No. 1998. Commission expires March 20, 1929.

[fol. 30] In United States District Court

[Title omitted]

Answer of Samuel Prela

Samuel Prela, for his answer to the petition of Louis Hubshman, the Trustee herein, respectfully shows to this Court and alleges:

First. Your petitioner respectfully objects to the jurisdiction of the Court to adjudge your respondent in contempt of Court for failure to comply with the terms of the order made November 9th, 1926, directing your respondent to account for or pay over to Louis Hubshman, goods, wares and merchandise and moneys alleged to be in the possession of your respondent herein and withheld from the Trustee.

Second. Your respondent respectfully submits that this Court is without summary jurisdiction without a hearing and determination on the merits thereof, to find that your respondent was at the time of the filing of the petition in bankruptcy herein and at the time of the entry of the order alleged to have been disobeyed to wit: November 9th, 1926, or at the date hereof, withholding any moneys or property

[fol. 31] belonging to his estate in bankruptcy or at the date hereof that he is able to comply with such turn over order and he prays that such a hearing be had upon the issues raised thereby.

For a separate and distinct matter in answer to the petition of the said trustee your respondent sets forth:

Third. That heretofore and by an order of Hon. Francis A. Winslow, United States District Judge, under date of November 9th, 1926, your respondent was directed to account for and pay over within ten days to Louis Hubshman, the Trustee in Bankruptcy of the estate of the above named bankrupt, the following, to wit:

a. Goods, wares and merchandise consisting of 6,099½ yards of silk, or the sum of $8,387.20, as the cash value thereof.

b. Cash in the sum of $436.04, representing proceeds of a check received by the bankrupt from the Equitable Life Assurance Society on or about September 26th, 1924.

c. Cash in the sum of $1,400.74, representing the proceeds of four checks for $405.59, $130.06, $650.29 and $214.80, each, respectively, received by the bankrupt from the Travelers Insurance Company on or about April 24th, 1924.

Fourth. That thereafter and feeling aggrieved by said order, your respondent through his counsel, Steinberg & [fol. 32] Levin, endeavored to obtain relief from the Circuit Court of Appeals for the Second Circuit for permission to allow him to appeal to the Circuit Court of Appeals from the order dated November 9th, 1926, referred to above. That permission has been refused and your respondent therefor is without appellate relief.

Fifth. Your respondent is also powerless to comply therewith and knows as a matter of fact that if he is permitted to establish by competent, credible and truthful evidence such complete inability, that he will be able to thereby convince this Court and a Referee other than the Referee before whom the turnover proceedings were originally had that a fundamental and gross injustice has been done to your respondent. That by reason thereof, your respondent applies to this Court for a rehearing and a re-

argument of the motion which resulted in the order of this Court, dated November 9th, 1926.

Sixth. Your respondent respectfully refers the Court to the report of Hon. Peter B. Olney, Jr., Referee in charge of this proceeding, in which the Referee makes the following comment:

"I find that the kind of blouses manufactured by bankrupt in the ordinary course of trade required 1½ yards of material per blouse. The average price paid per yard was $1.39."

Seventh. Your respondent respectfully calls the attention of the Court to the fact that the findings of the Ref- [fol. 33] eree and the confirmation of the report of the Referee is based principally upon the supposition that it required one and one half yards of material per blouse to manufacture the kind of blouses that was the product of your respondent's business and that in view of the fact that there were not sufficient blouses accounted for either in sales or in premises of your respondent at the time of bankruptcy, that therefore your respondent was chargeable with the difference in either yardage or manufactured product.

Eighth. Your respondent endeavored to explain to the Referee in connection with his testimony that the product manufactured by your respondent required material far in excess of the supposed quantity of material necessary to manufacture blouses, which was the principal product turned out in the factory of your respondent during the months of September, October and November, 1924, the Referee commented on your respondent's explanation at page 2 of the report as follows:

"Bankrupt's attempted explanation was based on his own uncorroborated and discredited testimony that he was during the period in question manufacturing mainly tunics and not blouses. It appeared to my satisfaction that tunics required more material than blouses. I do not believe bankrupt's testimony in this connection and I find that trustee has sustained the burden of proving a concealment * * *."

[fol. 34] Ninth. Your respondent therefore, without referring to his own testimony in connection with the fact that during the months of September, October and November, 1924, your respondent's business on account of a change in the prevailing fashions in women's wearing apparel asks this honorable Court to take into consideration the supporting affidavits attached to this answer made by Philip Diamond, Treasurer of the New York Waist House, the largest waist house in the United States, the affidavit of Philip Goldfrank, one of the largest dealers in waists, blouses and merchandise of a kindred character in the eastern states, the affidavit of Jacob Cohen who was the contractor employed by your respondent as the sole cutter of merchandise preparatory to the manufacture thereof for your respondent, and the affidavit of Jacob Rosen who was the salesman for your respondent, all of which tend to establish beyond the question of a doubt that the principal business transacted by your respondent in the months of September, October and November, 1924, was that of making and selling tunic blouses which required from twenty-two to twenty five yards of merchandise per dozen instead of a supposed figure of eighteen yards upon which the finding of the Referee is predicated.

Tenth. The discredited part of your respondent's testimony is based upon the fact that under examination under Section 21a of the Bankruptcy Act your respondent when asked about blouses testified that as to a certain blouse that the manufacture thereof required one and one-half yards of material at an average price of $2.25 a piece, and [fol. 35] in addition, the testimony of one Milton Hirsch, the largest creditor of your respondent did, while admitting that he knew nothing at all about the manufacture of blouses, testify that your respondent stated to him that it took one and one-half yards of material to make a blouse. This is a statement which your respondent under oath denied and insists is untrue and the improbability of the testimony of Hirsch is obvious from the fact that Hirsch claims to have asked of your respondent how he could manufacture blouses so cheaply inasmuch as he had inquired of and ascertained from other people that a blouse could not be manufactured out of one and one-half yards

of material, and yet in spite of seeming impossibility of successful manufacture, Hirsch continued to extend credit to your respondent.

Eleventh. Your respondent does not ask this Court to place any undue faith or credence in your respondent's story at this late date to the effect that only as to a particular blouse did he refer to one and one-half yards of material, nor to your respondent's statement at this time that during the period of September, October and November, 1924, he caused to be manufactured comparatively few blouses because of the lack of demand therefor but mostly tunic blouses which was the prevailing style and for which an insistent demand existed. Your respondent is merely confining himself entirely to the very explanation that should have been vouchsafed on the part of your respondent called for by the language of the Referee and clearly expressed in the report of the Referee in the following terms:

[fol. 36] "It appeared to my satisfaction that tunics required more material than blouses—bankrupt's attempted explanation was based on his own uncorroborated and discredited testimony."

Your respondent, therefore found himself in the position that by reason of the fact that no evidence of any kind was produced before the Referee by his counsel to adequately explain the difference in the quantity of merchandise consumed and your respondent's counsel at the hearings before the Referee having chosen to remain silent on the subject, your respondent now finds himself in a position where he might be committed for contempt for failure to comply with the terms of an order which would not have been granted had all of the facts been properly developed before the Referee. In other words, your respondent respectfully calls the attention of the Court to the fact that the Referee's idea as to what should have been proven before him would have established beyond the question of a doubt but that a contrary finding was more justifiable in the premises.

Twelfth. Your respondent is also prepared to establish not only through the testimony of Philip Goldfrank, Philip

Diamond, Jacob Rosen and Jacob Cohen but also by the operators who were employed in his factory that almost all of the merchandise that was manufactured in the months of September, October and November, 1926, by your respondent were tunic blouses calling for twenty-two [fol. 37] to twenty-five yards of material per dozen in the manufacture thereof.

Thirteenth. Your respondent is also prepared to establish beyond the question of a doubt through William Klein, your respondent's brother in law who was the assistant foreman and in charge of the shop during the months of September, October and November, 1924, that practically all of the merchandise manufactured during the said period were tunic blouses.

Fourteenth. That under the circumstances, your respondent is prepared to offer the testimony of the aforesaid persons before the Referee who originally heard these proceedings or any other officer of this Court who may be designated by the Court in seeking to establish the truth of the assertions made by your respondent so that the jurisdiction and truthfulness and accuracy of your respondent's testimony may be established by outside competent, believable and credible testimony.

Fifteenth. That inasmuch as the alleged concealment on the part of your respondent of the merchandise which the Referee finds is not accounted for is merely based upon theory and not upon facts, that your respondent prays that as a matter of right he is entitled to establish that the theory is predicated upon a misconception and misconstruction of the facts and that as a matter of fact no concealment of any kind occurred. In support of this position, your respondent respectfully informs the Court that the [fol. 38] entire evidence in connection with the discrepancy in yardage was based upon the report of the accountants, Maurice Goldberg & Company, who through their representative, Irving Barron, testified that the words written on the report in evidence referred to the amount of so-called blouses sold by your respondent in the months of September, October and November, 1924, were not based upon any information obtained from the books of account, but was

merely a supposition of the accountant. The words and phrases to which reference is made are as follows:

"Quantity blouses under the heading Analysis of Sales."

When entries were made in the charge book when a sale of merchandise was made to a customer there was no differentiation between blouses and tunics but merely the number of dozen that was being shipped to each customer and the price charged was all the information that appeared on the bills, a duplicate of which was retained in the charge book. It is therefore apparent that the testimony of Irving Barron, the accountant, is also erroneous and based upon a misconception of the facts for in assuming that the number of articles charged out to customers were merely blouses, which in the ordinary course required only eighteen yards of material to the dozen for manufacture, failed to give your respondent credit for the large quantities of tunics which went out to customers in the ordinary course of business and which in the course of manufacture, required up to twenty five yards per dozen.

[fol. 39] Sixteenth. The report of the accountant which obviously was based upon a misconception of the facts and did not contain a true transcript and did not reflect the true condition of affairs as appears by the books of your respondent was received in evidence and was considered by the Referee in making his determination. It is apparent therefore, that throughout the proceeding because of the failure to properly explain and establish the actual facts the Referee predicated a finding that a concealment claimed by your respondent to be theoretical only was established.

Seventeenth. Your respondent states further in reference to the second portion of the order referred to herein in connection with the moneys obtained from the Equitable Life Assurance Society and the Travelers Insurance Company turned over by your respondent to his wife amounting to the sum of $1,400.74. That those moneys were actually turned over by your respondent to his wife and deposited by her in her bank account and used by her for the purposes set forth in her affidavit, which is hereto attached and made a part hereof.

Eighteenth. In this connection, your respondent respectfully refers the Court to the fact that the endorsements on the checks themselves received from the Insurance Companies indicate unquestionably that these moneys were received by Mollie Prela, your respondent's wife, endorsed by her and deposited by her in her own account in the Lincoln Savings Bank, Borough of Brooklyn, City of New York, [fol. 40] and her testimony is available to establish that by reason of a series of illnesses that these moneys were consumed. The finding therefore, of the Referee that these moneys were concealed by your respondent is obviously contrary to what is established fact for these moneys certainly could not have been concealed by your respondent and at the same time received by his wife and disposed of by her in the manner in which she is ready, willing and able to explain to the satisfaction of this Court.

Nineteenth. That your respondent was examined on numerous occasions before the Referee herein in connection with these proceedings and as a result of the harassing methods employed and the relentless pursuit of your respondent coupled with his inability to properly provide for his family by reason of his financial misfortune, your respondent sustained a nervous breakdown and was compelled to undergo the care and medical attention of Dr. Howe of 40 South Oxford Street, Borough of Brooklyn, City of New York, under whose care and attention your respondent still remains.

Twentieth. That your respondent suffered a paralytic stroke on the right side of his face caused by the bursting of blood vessels leading into your respondent's right ear and as a consequence thereof, your respondent's hearing on the entire right side has become lost.

Twenty-first. That your respondent has become incapacitated to such an extent by reason of these proceedings and [fol. 41] his family is suffering immeasurably. That from the time that your respondent was originally brought before the Referee in connection with these proceedings he has endeavored to earn a livelihood and provide for his family but by reason of all of the foregoing circumstances, his entire mode of living has changed and he and his family have been reduced to the point where he must best support

his wife and child on earnings of $50.00 to $55.00 per week as a dress salesman. This form of employment is temporary in nature and does not provide any permanent means of income and your respondent was informed by Dr. Howe that by reason of the particular ailments affecting your respondent that he might at any time suffer dizzy spells and become unconscious. That your respondent's family will then be without any resources of any nature and a grave danger would exist that your respondent's family might become public charges or objects of charity.

Wherefore your respondent prays that the prayer contained in the petition of the Trustee be denied, or in the alternative that the issues be referred.

Dated July 5th, 1927.

Samuel Prela.

Duly sworn to by Samuel Prela. Jurat omitted in printing.

[fol. 42] In United States District Court

[Title omitted]

Affidavit of Mollie Prela

City of New York,
County of New York,
State of New York, ss:

Mollie Prela, being duly sworn, deposes and says that she is the wife of Samuel Prela, the above named bankrupt. [fol. 43] That she resides at No. 1655 Union Street, in the Borough of Brooklyn, City of New York, together with her husband and son, who is eighteen years of age and is not self supporting but is a high school student.

That for sometime prior to 1924 and during the entire year of 1924 and since then, up to and including the present day, your deponent suffered various illnesses in the nature of organic ailments and a general neurotic condition necessitating medical care and attention and for the greater part of 1923 up to and including the present day your de-

ponent has been under the care of Dr. Pollock, of Clinton Avenue, in the Borough of Brooklyn, City of New York, and Dr. Harry Cohen, of No. 712 Crown Street, in the Borough of Brooklyn, City of New York.

That by reason thereof it was necessary to expend sums of money for medical care and attention and rest cures, which moneys your deponent did not receive from her husband and could not utilize out of the weekly allowance of from $35.00 to $40.00, which was all that your deponent's husband drew from his business for household expenses.

That it became necessary for your deponent's husband to borrow moneys on the policies of life insurance issued to him by the Equitable Life Assurance Society and the Travelers Life Insurance Co. That these moneys, from time to time, were received by your deponent from her husband in the form of checks issued by the said insurance companies and were deposited by your deponent in her own bank account in the Lincoln Savings Bank, wherein your [fol. 44] deponent maintained a personal bank account. That the endorsements on the checks issued by the insurance companies will establish that these moneys were received by your deponent and actually went into her bank account and the pass book issued by the Lincoln Savings Bank will establish that fact. That these moneys were withdrawn by your deponent, from time to time, and were used by her for the payment of medical expenses and all other incidental expenses occasioned by reason of her illnesses.

That all moneys that were necessary for household expenses and other expenses which your deponent did not receive from her husband were in part taken from the funds deposited by her in the Lincoln Savings Bank.

That these funds have now become exhausted and at no time did your deponent receive or hold these moneys for the benefit or account of her husband but were received only for the purposes herein set forth.

Your deponent is informed that the Referee herein has found as a fact that these moneys, aggregating $1,400.74, have been concealed by deponent's husband from his creditors.

Your deponent respectfully submits that this is absolutely not the fact and that the expenditure of the moneys re-

ceived by her from her husband was actually made for the purposes stated herein. That no part of the same ever was concealed by her husband or withheld from his Trustee in Bankruptcy.

That untold hardships and deprivations have been suffered by your deponent by reason of the financial reverses [fol. 45] that Samuel Prela, the bankrupt herein, has suffered and because of his inability to properly provide for his family and by reason of the paralytic stroke which he himself has suffered by reason of the harrassment and methods employed by creditors in this case he has been unable to earn a livelihood and has become disabled to a considerable extent in the performance of his duties as a dress salesman, which is the only occupation open to him.

Your deponent therefore joins in the prayer of her husband for a re-hearing and an opportunity to establish the facts as they actually exist.

Mollie Prela.

Sworn to before me this 18th day of Dec., 1926. Anna Rosenstein, Bronx Co. Clk's No. 121. New York Co. Clerk's No. 587. New York Co. Register's No. 7432. Term expires March 30, 1927.

[fol. 46] In United States District Court

Affidavit of Philip Goldfrank

Philip Goldfrank, Dresses and Blouses, 491 Seventh Avenue, New York

State of New York,
County of New York, ss:

I, Philip Goldfrank, the undersigned, hereby depose and say that during the months of September, October and November in the year of 1924 bought merchandise from the Selwell Blouse Company and that sixty (60) percent of this merchandise consisted of tunic blouses which were in popular demand at the time.

Philip Goldfrank.

Sworn to before me this 29th day of November, 1926.
Everett C. Purnell, Notary Public, Kings County.
Cert. filed in N. Y. Co.

[fol. 47] In United States District Court

Affidavit of Jacob Cohen

City & County of New York, ss:

Jacob Cohen, being duly sworn, deposes and says that he resides at 797 Crotona Pk. N. in the Borough of Bronx, City of New York.

That he is now engaged as a contractor in the manufacture of ladies' dresses at 245 Seventh Avenue, in the Borough of Manhattan, City of New York.

That prior to November 24th, 1924, and for one and one-half years prior thereto, he was engaged as a cutter for Samuel Prela, doing business as Sellwell Blouse Co. at 122 West 26th Street, New York City.

That during the months of August, September, October and November, 1924, and up to the date of bankruptcy, your deponent was the sole cutter for said Samuel Prela, and during said period, your deponent knows that he cut mostly tunic blouses which required at least 25 yards to a dozen. That he also cut blouses during said period which required at least 20 to 22 yards per dozen.

Jacob Cohen.

Sworn to before me this 7th day of December, 1926.
Samuel Beecker, Notary Public, Bronx Co., etc.

[fol. 48] In United States District Court

Affidavit of Jacob Rosen

December 3, 1926.

To whom it may concern:

I herewith acknowledge the fact that I have been a salesman for the Sellwell Blouse Company for the last two years.

For the months of August, September, October and November, the biggest majority of my sales consisted of tunic blouses, in the year of 1924.

Jacob Rosen.

State of New York,
County of New York, ss:

Sworn to before me this 3rd day of December, 1926.
Joseph Diamond, Notary Public, Kings Co., No. 292, etc.

[fol. 49] In United States District Court

Affidavit of Philip Diamond

New York Waist House, Inc., 1115 Broadway, New York

Executive Office

December 3, 1926.

To whom it may concern:

This is to certify that we have done business with the Sellwell Blouse Company in the year of 1924, for the net paid amount of $2,797.50, divided into the following months:

January	$366.75
April	528.25
May	766.25
August	378.75
Sept.	191.25
October	566.25

While we are not sure which amount was paid for tunics or for waists, we are certain that a big majority consisted of tunics, and they were paid during the months of August, September and October.

New York Waist House, Inc. Philip Diamond, Treasurer.

PD.SE.

State of New York,
County of New York, ss:

Sworn to me this 3rd day of December, 1926.
Joseph Diamond, Notary Public, Kings Co. Cert. filed in New York Co. (Seal.)

[fol. 50] In United States District Court

Memorandum Opinion, Winslow, D. J.

The question as to the ability only of the bankrupt to comply with the summary order will be referred to Referee Olney. See re J. H. Small Shoe Company, ex parte, Mary G. Potter, Trustee, etc.

F. A. Winslow, U. S. D. J.

July 7th, 1927.

In United States District Court

[Title omitted]

Order Referring Issues to Referee—July 8, 1927

A motion having been made by Louis Hulshman, Esq., Trustee of the estate of the above named bankrupt for [fol. 51] an order adjudging Samuel Prela, the said bankrupt, in contempt of Court for an alleged failure to comply with an order of this Court directing the said bankrupt to pay over to his Trustee goods, wares and merchandise and moneys belonging to this estate and alleged to have been in his possession and withheld by him from his Trustee in Bankruptcy, more specifically described as follows, to wit:

1. Goods, wares and merchandise consisting of 6,000 yards of silk, or the sum of $8,387.20, as the cash value thereof.

2. Cash in the sum of $4,360.04, representing proceeds of a check received by the bankrupt from the Equitable Life Assurance Society on or about September 26th, 1924.

3. Cash in the sum of $1,400.74, representing the proceeds of four checks for $405.59, $130.06, $650.29 and $214.80, each respectively, received by the bankrupt from the Travelers Insurance Company on or about April 24th, 1924;

and why an order should not be made forthwith directing the said Samuel Prela, said bankrupt, to be apprehended by the Marshal of the United States District Court for the Southern District of New York and committed and imprisoned as and for such contempt until he shall obey the order aforesaid or until the further order of the Court and [fol. 52] why the Trustee herein should not have such other and further relief as to the Court may seem just and proper in the premises, and said motion having duly come on before Hon. William Bondy, United States District Judge, on the 6th day of July, 1927, and the bankrupt having appeared in person and by Archibald Palmer, his attorney, and said motion having thereafter been referred by said Hon. William Bondy, United States District Judge, to Hon. Francis A. Winslow, United States District Judge, and said motion having duly come on before said Hon. Francis A. Winslow, United States Disrtict Judge, on the 7th day of July, 1927, and after hearing George Lion Cohen, Esq., in support of the motion, and the bankrupt appearing in person and by Archibald Palmer, his attorney, appearing in opposition thereto, and upon reading and filing the order to show cause made by this Court dated the 12th day of May, 1927, upon the petition of Louis Hulshman, Esq., Trustee herein, verified the 22nd day of April, 1927, the affidavit of George Lion Cohen, Esq., sworn to the 12th day of May, 1927, the report of Hon. Peter B. Olney, Jr., Referee, dated the 13th day of April, 1927, the special objection of Samuel Prela, the bankrupt herein, and his affidavit, sworn to the 5th day of July, 1927, the affidavit of Mollie Prela, sworn to the 18th day of December, 1926, the affidavit of Philip Goldfrank, sworn to the 29th day of November, 1926, the affidavit of Jacob Cohen, sworn to the 7th day of December, 1926, the affidavit of Jacob Rosen, sworn to the 3rd day of December, 1926, and the affidavit of the New York Waist [fol. 53] House, Inc., sworn to the 3rd day of December, 1926, and upon all the proceedings had herein and after

hearing George Lion Cohen, Esq., attorney for the Trustee, in support of the said motion, and Archibald Palmer, attorney for the bankrupt in opposition thereto, and due deliberation having been had thereon, and the Court having rendered a memorandum opinion thereon, dated the 7th day of July, 1927, it is

Ordered, that the issues raised by the aforementioned papers and pleadings as to the ability of the above named bankrupt to comply with the turnover order made by this Court, dated the 9th day of November, 1926, be, and the same hereby are, referred to Hon. Peter B. Olney, Jr., as Referee, for hearing, testimony and report and that the said hearings proceed with all convenient speed.

F. A. Winslow, U. S. D. J.

[fol. 54] In United States District Court

[Title omitted]

Testimony Before Referee on Hearing

New York, July 12, 1927—3:30 o'clock, p. m.

Before Hon. Peter B. Olney, Jr., Referee

Hearing on Order of Judge Winslow

Appearances: George Lion Cohen, Esq., attorney for trustee; Archibald Palmer, Esq., attorney for bankrupt, by Mr. Rosenstein, of counsel; Mr. Samuel Prela, the bankrupt.

Colloquy Between Referee and Counsel

The Referee: The burden of going forward is on the bankrupt.

Mr. Cohen: Right at the outset, if your Honor pleases, I desire to make a number of motions with respect to the bankrupt's answer and answering affidavits. Through in[fol. 55] advertence the original has not been brought down from the District Court, but it is agreeable to Mr. Rosenstein that this copy which I have be used by the Referee.

The Referee: Was this before me originally?

Mr. Cohen: No, sir, this is an answering affidavit put in one the motion to punish for contempt.

The Referee: Now, what are your motions?

Mr. Cohen: I respectfully move to strike out paragraph First, Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, Nineteenth, Twentieth and Twenty-first, all with the exception of paragraphs Third and Fourth of the answer and to strike out the supporting affidavits upon the grounds, first the ground that I moved to strike out the paragraphs of the answer, namely, on the ground they are not material, competent or germaine to the issues involved and also on the further ground that these affidavits, to the best of my knowledge, are really not affidavits but copies of affidavits submitted in another proceeding. I do not want to be technical on this proceeding if I can help it but——

Mr. Rosenstein: They are original affidavits on file in the United States District Court and by reference they are made part of this proceeding.

Mr. Cohen: In support of my motion, I wish to state the case cited by Judge Winslow, in re Small Shoe Company, from which it appears that the law is decided by the Cir- [fol. 56] cuit Court of Appeals in this District, is to the effect all the matters set forth in the paragraphs stated by me are wholly incompetent and of no value whatsoever and proof cannot be introduced in support thereof.

Mr. Rosenstein: The District Court had before it all of the affidavits and the District Court included all these affidavits in the order which it made and referred all the issues raised by those very answering affidavits to your Honor to hear and report. It seems to me if the District Court thought these affidavits raised an issue the proper place to make a motion to dismiss would be before the District Court. Mr. Cohen cannot come here and ask your Honor to limit the scope of the proof.

The Referee: I do not care about all this. I am going to take testimony only as to the man's disposition of the property found by my order to have been in his hands or under

his control at that time. This ruling is under the Small case.

Mr. Rosenstein: I take an exception.

The Referee: You have an exception. If that were not the law this matter could be thrashed over time after time.

Mr. Rosenstein: I will ask your Honor to certify the question to Judge Winslow as I contend we have a right to go into all the matters under the affidavits.

The Referee: I decline to so do. You can make a motion to resettle the order of Judge Winslow if you wish, but I am perfectly clear on the order of Judge Winslow and his mem- [fol. 57] orandum and the Small case which he expressly cites that he intended me only to take testimony as to the present ability of the bankrupt to comply with the order and that means since the entry of the order what disposition he has made of the money.

Mr. Cohen: I think it should appear on the record that the order of Judge Winslow is the order prepared and submitted by Mr. Palmer and that was the order signed by Judge Winslow. Judge Winslow had an opportunity to sign an order submitted by the attorney for the Trustee but signed Mr. Palmer's order.

The Referee: All right, let us proceed with the hearing.

Mr. Rosenstein: I take it your Honor declines to certify the question and prefers it be done on motion to resettle the order.

The Referee: I do not want it done at all, I believe it is perfectly clear as it is. Proceed. What is the date of the order?

Mr. Cohen: Your order is July 8th, confirmed by Judge Winslow November 9, 1926.

The Referee: Then you made a motion to punish for contempt after that?

Mr. Cohen: Thereafter an application was made to the Circuit Court of Appeals for leave to appeal and that was denied and an order was entered December 9th, 1926. Thereafter an application was made to Judge Winslow for reargument and that motion was denied and an opinion rendered by Judge Winslow.

The Referee: What date?

[fol. 58] Mr. Cohen: That was in February or March, 1927.

The Referee: I will assume that the time is July, 1926.

Mr. Cohen: July 8, 1926, yes.

The Referee: Now, direct your inquiry to any period subsequent to that time.

Mollie Prela, a witness called by the Bankrupt, having been first duly sworn, testified as follows:

Direct examination by Mr. Rosenstein:

Q. You are the wife of Samuel Prela, the bankrupt in this proceeding?

A. Yes.

Q. And where do you live?

A. I live at present at 740 Empire Boulevard.

Q. In the Borough of Brooklyn?

A. Yes, sir.

Q. And you live at that address with your husband and your son, is that right?

A. Yes, sir.

Q. Has your husband been employed by anybody since July, 1926?

A. He has been employed as a salesman by the Martha Dress Company.

Q. And is your husband bringing in any salary each week to you?

A. No.

Q. Does your husband contribute anything towards the support of the household?

A. No.

Q. Has your husband contributed anything in the way of cash contributions toward the support of the household [fol. 59] since July, 1926?

A. No, sir.

Q. Now, you say your husband is employed by the Martha Dress Company, is that right?

A. Yes, sir.

Q. And the Martha Dress Company is a concern in which you have an interest, is that right?

A. Yes, sir.

Q. How much capital did you invest in that business?

A. Well, I invested $600 in that business.

Q. Where did you get the $600?

A. I borrowed that money from a brother-in-law of mine and my cousin.

Q. Who is your brother-in-law and how much did you borrow from him?

A. I borrowed $300 from him.

Q. What is his name?

A. Max Prela.

Q. That is your husband's brother?

A. Yes.

Q. When did you borrow that money from him?

A. When I had to buy the place.

Q. Who is your cousin that you borrowed the other $300 from?

A. Gand & Gand from Passaic, New Jersey.

Mr. Cohen: May I reserve the right to move to strike out all this testimony. I do not think it is all material or germane. I want to give the bankrupt every opportunity that he may have but I also must protect the rights of the Trustee.

The Referee: Yes, you may reserve such a right.

Mr. Rosenstein: I wish to show by the testimony of this [fol. 60] witness the bankrupt was unable to comply when the turnover order was made.

The Referee: I will take no such testimony, any testimony directed to that end will not be received or will be stricken out if it gets in inadvertently.

Mr. Rosenstein: I take an exception to your Honor's ruling.

The Referee: You have an exception, proceed.

Q. Now, the Martha Dress Company is engaged in the business, in the contracting business, is that right?

A. Yes, sir.

Q. And did your husband, Samuel Prela, contribute anything towards the capital of that concern?

A. No, sir.

Q. Are you actively in that business every day?

A. I am.

Q. What connection has your husband with the concern, what does he do?

A. He is a salesman [illegible], you know, he makes up samples and goes out and tries to get business.

Q. He takes a sample dress and goes around to different manufacturers and tries to solicit business that way.

Q. Does your husband sign any of the checks of that firm?

A. No, sir.

Q. Did you receive any money from your husband amounting to the sum of $1,400.74 or thereabouts representing the proceeds of some policies of insurance issued by the Travelers Insurance Company on the life of your husband?

A. Yes.

[fol. 61] Q. Do you recall when you received it?

A. I do not remember just when I received it, but the photographs are here.

Mr. Cohen: Was it before the petition or after?

Q. Have you any recollection when you received this money from your husband?

A. No, I cannot remember.

Q. Do you recall when you received this $1,400 or the proceeds of this life insurance in checks from the Travelers Life Insurance Company?

By the Referee:

Q. What year was it?

A. I cannot remember that.

The Referee: The testimony will be stricken out then.

Mr. Cohen: It is April, 1924, and I move to strike it out on the ground it is a transaction before the turnover order.

The Referee: Motion granted.

Mr. Rosenstein: Exception.

By Mr. Rosenstein:

Q. Now, the moneys you did receive from your husband, representing the proceeds of life insurance company checks, what did you do with them?

Mr. Cohen: I make the same objection to that.

[fol. 62] The Referee: Sustained.

Mr. Rosenstein: Exception. Of of the amounts recovered are sought to be recovered by this order is this particular sum and I think I have a right to prove where this money went to.

The Referee: No, because the order finds that he had that under his control.

Mr. Rosenstein: If I can show this money is not in the possession of the bankrupt today and has been disposed of, I think I have a right to show it.

The Referee: All right, if you want to show it was disposed of since July, 1926, you may.

Mr. Rosenstein: I will do the best I can.

The Referee: Since July, 1926, I will not have a lot of testimony that is not within the issues.

Q. You had a bank account, Mrs. Prela, in the Lincoln Savings Bank?

A. Yes, sir.

Q. Did you have any other bank account in your own name?

A. No, sir.

Q. In that bank did you deposit any moneys which you received from your husband representing the proceeds of life insurance checks?

Mr. Cohen: I object to that as incompetent, irrelevant and immaterial and not within the issues. There is no proof she received any of the money, the bankrupt has been ordered to turn over since July 8, 1926, and any questions [fol. 63] with respect to the disposition of moneys of which there is no evidence she received the same are improper.

The Referee: It is conceivable it might be considered under his control if his wife had it. Overruled.

A. Yes, I deposited the money there but I used the money up because I can prove I was sick.

Mr. Rosenstein: I consent the last part of the answer be stricken out.

The Referee: All right, go ahead.

Q. Now, do you recall the amount that you deposited in this bank representing the proceeds of these checks?

A. I cannot recall just the exact amount.

Mr. Cohen: The Trustee will concede the evidence in the turnover hearing disclosed the fact the bankrupt had transferred to his wife's bank account checks aggregating $1,400.74, but the trustee respectfully objects to the introduction of any evidence as to the disposition of this money by Mrs. Prela inasmuch as it is not testimony on the part of the bankrupt. It is up to the bankrupt to explain what he did with the money since July 8, 1926. Any testimony in regard to money prior to that is not within the issues.

The Referee: I shall so hold.

[fol. 64] Mr. Rosenstein: Is it your concession the $1,400.74 referred to in paragraph marked 3 on the first page of Judge Winslow's order, dated July 8, 1927, representing proceeds of the four checks for $405.50, $130.08, $650.29 and $214.80, those four checks were given by the bankrupt to his wife and the wife received these checks and deposited them in her own bank account?

Mr. Cohen: At the previous hearing it appeared these checks were endorsed by the bankrupt to his wife and deposited to her account under a different name in the Lincoln Savings Bank.

Mr. Rosenstein: What do you mean by a different name?

Mr. Cohen: M. Porilla.

Q. Under what name did you keep this bank account?

A. At that time I just signed my name that way but it made no difference.

Q. You were the same person?

A. Yes.

Q. You were known as M. Porilla?

A. Yes, I just signed the name different.

Q. Did you produce your bank book here at the hearing on the turnover proceeding?

A. Yes, sir, Mr. Cohen had the book.

Q. Did you have any bank account under any other name?

A. No, sir.

Q. Now, do you recall offhand without looking at any printed or written record the date when you received these moneys aggregating $1,400.74?

A. No, I cannot remember the date.

[fol. 65] Q. Now, since July 8th, 1926, have you spent any of the moneys that you received from your husband aggre-

gating these sums for the account of your husband or for yourself or for any purpose at all? Do you understand what I mean?

A. No, sir.

By the Referee:

Q. Within the last year, since July 8th, 1926, have you spent any of this $1,400?

A. I have not had any money since.

By Mr. Rosenstein:

Q. This $1,400.74 you want us to understand was received by you prior to July 8, 1926?

A. It was received before.

The Referee: Certainly it was received prior to that, it was received about April, 1924.

Q. From April, 1924, down to July 8, 1926, did you at all times have possession of these moneys?

A. No.

Q. Did you hold these moneys for your husband?

A. No, I spent that money.

By the Referee:

Q. When, prior to July, 1926?

A. I have been sick.

Q. You state you did not have any of it after July 8, 1926?

A. No, I did not have any.

[fol. 66] The Referee: What she did prior to July 8, 1926, with the money is improper under these issues here as there has been an adjudication he had that money under his control on that date. Now, if you have any testimony to offer as to the disposition of the money after July 8, 1926, you may offer it. I will not take any testimony as to what was done with the money prior to the date of my order. It has been decided and confirmed and there was a reargument and the Circuit Court of Appeals refused to allow an appeal.

Mr. Rosenstein: Will your Honor grant me an adjournment so I can move for a resettlement of the order or take whatever steps I may desire?

The Referee: In what other way can you bring it up?

Mr. Rosenstein: I will move the District Court to direct your Honor to certify the question.

Mr. Cohen: I wish to object to the dilatory tactics employed by the bankrupt. Judge Winslow has told Mr. Palmer and myself that he would be away on a vacation until the 25th of August.

The Referee: I will grant a short adjournment at this time.

Adjourned to July 19, 1927, 4 P. M.

[fol. 67] New York, July 19, 1927—4 o'clock, P. M.

Before Hon. Peter B. Olney, Jr., Referee

Adjourned hearing on order of Judge Winslow.

Present: The Referee, Mr. Cohen, Mr. Prela, Mr. Rosenstein.

Colloquy Between Referee and Counsel

Mr. Rosenstein: Now, if it pleases your Honor we went before Judge Knox and asked him to give us an appointment to take up the question raised at the last hearing and Judge Knox sent back word it should be brought on on the regular motion calendar.

The Referee: Did you do that?

Mr. Rosenstein: We served Mr. Cohen with a notice of motion to be heard tomorrow. Last Wednesday we appeared before Judge Knox at ten-thirty and waited until half past eleven and with no sign of Mr. Cohen or anybody from his office. Now, Mr. Cohen came in at twelve o'clock and I was at my office and in the meantime we endeavored [fol. 68] to make this appointment with Judge Knox. Now, the motion with respect to instructions is returnable tomorrow morning before the District Court. In the meantime correspondence has passed between Mr. Cohen and our office regarding the hearing today. We sent a subpoena to Maurice Goldberg & Company, the accountants for the trus-

tee to produce the records of the bankrupt which were in their possession and their report based upon the examination of these records and they wrote us a letter which I will show your Honor.

The Referee: What has this to do with the issues? You are trying to rip the whole thing open again.

Mr. Rosenstein: Under the theory we are pursuing we believe there is no basis for the turnover order and, therefore, the bankrupt cannot comply with it.

The Referee: You are trying to take a position the Circuit Court of Appeals has held you cannot take.

Mr. Cohen: Presuming the Court decides Mr. Rosenstein cannot go into the whole matter any further, I contend the books and records of the bankrupt are not competent.

The Referee: Yes, I shall so hold.

(Adjourned to July 25, 1927, 12:15 P. M.)

[fol. 69] New York, July 25, 1927—12:15 o'clock, P. M.

Before Hon. Peter B. Olney, Jr., Referee

Adjourned hearing on order of Judge Winslow.

Present: The Referee, Mr. Cohen, Mr. Rosenstein, Mr. Preis.

Mr. Rosenstein: Mr. Referee, I make a formal offer of proof which I have prepared in writing and if it is acceptable in form that is about all we can do at the present time. I ask this offer of proof be spread upon the record.

The Referee: As I understand this offer of proof contains no offer whatsoever to make any proof as to what was done with the property found to be concealed since the date of the order; is that correct?

Mr. Rosenstein: That is correct.

The Referee: There is no offer to make any proof of what was done with the property after that date?

Mr. Rosenstein: That is correct.

The Referee: And you are not prepared to offer any proof along that line, is that correct?

[fol. 70] Mr. Rosenstein: That is correct, if your Honor will permit me to make a statement.

The Referee: Make your statement.

Mr. Rosenstein: That is the position we must take in view of your Honor's ruling we must accept the order of July 8th, 1926 as correct.

The Referee: I understand all that. You contend you can open up the whole thing and that is where I say you are wrong. Is the hearing closed with this offer of proof?

Mr. Rosenstein: Yes, sir.

Samuel Prela, the above named bankrupt, by his counsel, takes exception to the ruling of the Referee excluding all evidence offered on the part of the said bankrupt tending to establish the inability of the bankrupt to comply with the turnover order made against him by the said Referee on the 8th day of July, 1926, by establishing that the order itself is erroneous, not based upon actual facts or upon accurate, reliable or credible evidence and that the same was made upon a mistaken theory.

The bankrupt takes exception to the ruling of the Referee holding that the bankrupt is required to accept the order of July 8th, 1926, as correct and requiring the said bankrupt to explain the disappearance or disposition of the moneys and property set forth in the said order upon the ground that the order of reference upon which the hear-[fol. 71] ings now pending before the said Referee are proceeding, made by Hon. Francis A. Winslow, District Judge, on the 8th day of July, 1927, directed that the issues raised by all of the papers and pleadings enumerated in detail in the said order imposed no such limitation of the bankrupt in respect to the proof to be adduced in his behalf on said issues.

The bankrupt offers to prove that at no time since the commencement of the bankruptcy proceedings and particularly on the 8th day of July, 1926, or at any time thereafter, was he in possession of 6,999½ yards of silk constituting property belonging to his estate in bankruptcy and which was not turned over to his trustee.

The bankrupt offers to prove that the method of computation employed by the Referee in determining any shortage of silks to be accounted for by the bankrupt was completely erroneous in that the Referee found as a matter of fact that in the ordinary course of trade the bankrupt required to manufacture the kind of blouses produced by

him 1½ yards of material per blouse or a total of 18 yards per dozen blouses. That as a matter of fact the bankrupt claims that he can establish, by competent and credible evidence, that the manufactured garments produced in the factory operated by him prior to his bankruptcy required from 22 to 26 yards of material per dozen garments.

[fol. 72] The bankrupt offers to prove that there is an erroneous assumption on the part of the Referee in respect to the turnover motion calling for an accounting by the bankrupt as to the quantity of merchandise which came into the possession of the Trustee in assuming that blouses and not tunics were the principal product of the bankrupt's factory.

The bankrupt offers to prove by competent and credible evidence that a great proportion of the merchandise manufactured in his factory and sold to his customers in the regular course of business were tunics calling for 26 yards of material per dozen and which were manufactured in sufficient quantity to satisfactorily explain and account for the alleged discrepancy.

The bankrupt offers to prove, by the certified public accountants employed by the Trustee, that the books of the bankrupt did not indicate that the product manufactured by the bankrupt were blouses and not tunics.

The bankrupt offers to prove that the testimony of Milton Hirsch to the effect that all that was required to manufacture the garments sold by the bankrupt were 18 yards per dozen was untrue and not founded upon any facts but was mere conjecture upon which undue reliance was placed by the Referee and the unreliability of which testimony could be clearly established by competent and credible evidence.

[fol. 73] The bankrupt offers to prove that no credit was given to him for one hundred and forty to one hundred and fifty sample tunics and blouses, each of which samples required from 3½ to 4 yards of material in their preparation, thereby accounting for at least 500 yards of material.

The bankrupt offers to prove, by competent and credible evidence, that at the time of the filing of the petition in bankruptcy he was not in possession of the sum of $439.04, representing the proceeds of a check received by him from the Equitable Life Assurance Society, dated on or about

the 26th day of October, 1924. That the said check was received by the bankrupt approximately two months preceding his bankruptcy and was converted by him into cash, part of which was used for the repayment of a debt and the balance, in part, expended towards the support and maintenance of the aged father of the bankrupt.

The bankrupt offers to prove that the following checks, to wit, $405.59, $130.06, $650.29 and $214.80, amounting in the aggregate to $1,400.74, representing proceeds of payments made by the Travelers Life Insurance Co., on or about the 24th day of April, 1924, more than six months preceding the filing of the petition in bankruptcy, were actually transferred by him to his wife, Mollie Prela, and received by her and deposited by her in her own bank [fol. 74] account which she had maintained for a period of over twenty years, and that these moneys were used by Mollie Prela, the bankrupt's wife, to defray medical expenses incurred by her by reason of a serious and severe illness, from which the wife of the bankrupt has not yet fully recovered.

The bankrupt offers to prove that the entire order of July 8th, 1926, is based upon a gross misconception of the actual facts in relation to the business of the bankrupt and that at no time did he conceal or withhold any money or property belonging to his estate in bankruptcy.

The bankrupt offers to submit evidence to show facts exonerating him from liability under the turnover order in the manner and effect suggested by the Court.

In re Weber, 29 A. B. R., 217; 200 Fed., 404.

The bankrupt insists that as a matter of right and as a matter of law, that he is entitled to establish all of the evidence available upon all of the issues raised by the affidavits enumerated in the order of reference made by the District Judge, dated the 8th day of July, 1927.

Mr. Cohen: May I make a statement?

The Referee: Yes.

Mr. Cohen: I move to strike out all of the testimony so far offered under objection in so far as same relates to any [fol. 75] matters antedating July 8th, 1926, the date of the turnover order and I move to strike out all testimony with

reference to anything that transpired prior to July 8th, 1926.

The Referee: That is the testimony of the wife?

Mr. Rosenstein: That relates to a very important matter in issue and was conceded by Mr. Cohen to have existed and that is that Mrs. Prela actually received these four insurance checks prior to the bankruptcy.

The Referee: That was all put in in the turnover motion.

Mr. Rosenstein: I do not think Mrs. Prela was called in the turnover motion.

The Referee: Perhaps not but the checks were put in evidence. The motion is granted.

Mr. Rosenstein: Exception.

Hearing closed.

[fol. 76] In United States District Court

[Title omitted]

Notice of Motion for Instructions to Referee

Sir: Please take notice that the undersigned will move this Court, at a Stated Term thereof, to be held at the Post Office Building, in the Borough of Manhattan, City of New York, on the 20th day of July, 1927, at ten-thirty o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, for instructions to Hon. Peter B. Olney, Referee in Bankruptcy, in respect to the proof to be adduced on the issues referred to him by the order made by Hon. Francis A. Winslow, United States District Judge, dated the 8th day of July, 1927, and for such other and further relief as to the Court may seem just and proper in the premises.

Dated July 15th, 1927.

Yours, etc., Archibald Palmer, Attorney for Bankrupt. Office & P. O. address: No. 2 Lafayette Street, Borough of Manhattan, city of New York.

[fol. 77] To George Lion Cohen, Esq., Attorney for Trustee. Office & P. O. Address: No. 285 Madison Avenue, Borough of Manhattan, City of New York.

In United States District Court

Memorandum Opinion, Knox, D. J., on Motion for Instructions

Motion denied. I shall not instruct the Referee as requested by petitioner. When the Referee has passed finally upon the reference before him the matter may be brought before this Court in regular order.

Jno. C. Knox, U. S. D. J.

7-20-27.

[fol. 78] In United States District Court

[Title omitted]

Order Denying Motion for Instructions—July 21, 1927

A motion having been made by the bankrupt for an order instructing the Honorable Peter B. Olney, Jr., Referee in Bankruptcy, in respect to the proof to be adduced before him on the issues referred to him by the order made by Hon. Francis A. Winslow, United States District Judge, dated July 8, 1927, and for such other and further relief as to the Court may seem just and proper in the premises, and said motion having duly come on to be heard before Hon. John C. Knox, United States District Judge, at a term for [fol. 79] motions, held on the 20th day of July, 1927, and after hearing Archibald Palmer, Esq., attorney for the Bankrupt, in support of the said motion, and George Lion Cohen, Esq., attorney for the Trustee herein, in opposition thereto, and upon reading and filing the notice of motion dated July 15, 1927, and upon all the proceedings had herein and due deliberation having been had thereon, and the Court having rendered a memorandum opinion thereon, dated the 20th day of July, 1927, it is, on motion of George Lion Cohen, Esq., attorney for the Trustee,

Ordered that the said motion be, and the same hereby is in all respects denied.

Jno. C. Knox, U. S. D. J.

[fol. 80] In United States District Court

[Title omitted]

Report of Referee—August 16, 1927

To the Honorable the Judges of the United States District Court for the Southern District of New York:

I, Peter B. Olney, Jr., to whom were referred as Referee for hearing, testimony and report by order of the District Court dated July 8, 1927 the issues raised by the papers and pleadings referred to in said order "as to the ability of the bankrupt to comply with the turnover order made by this court dated the 9th day of November 1926," do hereby report as follows:

On July 8, 1926 as Referee I made a turnover order against the bankrupt, which, upon petition to review to the District Court, was affirmed by order of said court dated November 9, 1926. This order contained the following provisions ordering that:

"the bankrupt herein, account for and pay over within ten (10) days, to Louis Hubshman, his trustee herein, the [fol. 81] following goods, wares and merchandise, and money belonging to his estate in bankruptcy, and found to be in his possession or under his control and found to be concealed by him, to wit:"

"1. Goods, wares and merchandise consisting of 6,666⅔ yards of silk, or the sum of $8,287.20, as the cash value thereof.

2. Cash in the sum of $436.04, representing proceeds of a check received by the bankrupt from the Equitable Life Assurance Society on or about September 26th, 1924.

3. Cash in the sum of $1,400.74, representing the proceeds of four checks for $405.59, $120.06, $650.29, and $214.80 each, respectively, received by the bankrupt from the Travellers Insurance Company on or about April 24th, 1924."

Bankrupt then made a motion in the Circuit Court of Appeals for leave to appeal to that court, which was de-

nied. Bankrupt then made a motion in the District Court for a rehearing, which was also denied.

Bankrupt failed to comply with the turn-over order and this motion was made to punish him for contempt.

Judge Winslow's memorandum decision on this motion is as follows: "The question as to the ability only of the bankrupt to comply with this summary order will be referred to Referee Olney. See Re J. H. Small Shoe Company, ex parte Mary G. Potter, Trustee, etc." Judge [fol. 82] Learned Hand writing the opinion of the Circuit Court of Appeals of the 2nd Circuit in the Small Shoe Company case referred to by Judge Winslow says: "We held in Re Stavrahn, 174 Fed. 330, 98 C. C. A. 202, 20 Ann. Cas. 888, that upon contempt proceedings the summary order to surrender or pay made out a prima facie case. In re Weber, 200 Fed. 404, 118 C. C. A. 566, we not only repeated this, but went further. We said that the respondent did not answer the prima facie case so made out by a bare denial that he could then comply with the order. At best, he has only two courses open to him: First, he may accept the order as correct when made, in which case he must show that he has since its entry, disposed of the money then found to be in his hands or within his control. Whether the trustee has the burden of proof we need not now say, but the duty of going forward is upon the respondent, and he can fulfill it only by accounting circumstantially for his disposition of the property.

"His other possible course depends upon the assumption that the measure of proof in contempt proceedings is criminal; i. e., beyond a reasonable doubt, a question on which we do not now pass. If so, he may argue that he was not shown beyond a reasonable doubt to have had possession of the property when the summary order was entered."

The order refers to me only the question of the bankrupt's ability to comply so the question of the measure of proof referred to by Judge Hand is not before me.

[fol.] In passing upon this question I must apply the rule of law laid down in this connection by Judge Hand in

the Small Company case. It is obvious that Judge Winslow had exactly this in mind as he refers to the Small Shoe case in the memorandum handed down by him.

I accordingly held on the hearings before me that the burden was on the bankrupt to go forward with evidence tending to show that since the date of the turn over order, July 8, 1926, he had disposed of the property by that order found to be in his possession or control and that as a result he was unable to comply with the order. On this theory I declined to receive, or struck out if received, all evidence designed to show that as a matter of fact bankrupt was not in possession or control on July 8, 1926 or prior thereto of any property of which by order of July 8, 1926 he was found to be in possession or control. No evidence was either produced or offered by bankrupt to show what had been done with the property since July 8, 1926.

The Trustee's prima facie case made out by the turn over order (see Small Shoe Company case) is entirely unanswered by bankrupt and I accordingly find that the property is still in his possession or control and that as he has failed to comply with the turn over order he should be punished for contempt.

All of which is respectfully submitted.

New York, August 16th, 1927.

Peter B. Olney, Jr., Referee.

[fol. 84] In United States District Court

[Title omitted]

Notice of Motion to Confirm Report

Sir: Please take notice that upon the order to show cause made by this Court and dated the 12th day of May, 1927; upon the petition of Louis Hulshman, trustee herein, verified the 22nd day of April, 1927; the affidavit of George Leon Cohen, Esq., sworn to the 12th day of May, 1927; the report of Hon. Peter B. Olney, Jr., referee, dated the 13th day of April, 1927; the answering affidavit of Samuel Prela, the bankrupt herein, sworn to the 5th day of July,

1927, and the papers thereto annexed; the order of this Court, dated July 8th, 1927; the report of Hon. Peter B. Olney, Jr., referee in bankruptcy, dated August 16th, 1927; and upon all of the papers filed and the proceedings had herein, the undersigned will respectfully move this Court, at a stated term thereof, for motions, to be held in the Federal Court House, in the Post Office Building, in the [fol. 85] City of New York, borough of Manhattan, on the 31st day of August, 1927, at 10:30 o'clock A. M., on said date, or as soon thereafter as counsel can be heard, for an order in all respects confirming the said report of Hon. Peter B. Olney, Jr., dated August 16th, 1927; and for a further order dismissing the answer of the said Samuel Prela, sworn to the 5th day of August, 1927; and for a further order adjudging the said Samuel Prela, the said bankrupt, in contempt of Court for his failure to comply with the order of this Court, directing the bankrupt to pay over to his trustee goods, wares and merchandise and moneys belonging to his estate, and found to be in his possession, and withheld or concealed by him from his trustee in bankruptcy, more specifically described as follows, to wit:

1. Goods, wares and merchandise consisting of 6,099½ yards of silk, or the sum of $8,387.20, as the cash value thereof.

2. Cash in the sum of $436.04, representing proceeds of a check received by the bankrupt from the Equitable Life Assurance Society on or about September 26th, 1924.

3. Cash in the sum of $1,400.74, representing the proceeds of four checks for $405.59, $130.06, $650.29, and $214.80 each, respectively, received by the bankrupt from the Travelers Insurance Company on or about April 24th, 1924; [fol. 86] and for an order directing that the said Samuel Prela, the bankrupt herein, be apprehended forthwith by the marshal of the United States District Court for the Southern District of New York, and committed and imprisoned as and for such contempt until he shall obey the

order aforesaid, or until the further order of this Court; and for such other and further relief as to this Court may seem just and proper in the premises.

Dated New York, August 24th, 1927.

Yours, etc., George Lion Cohen, Attorney for Trustee. Office & P. O. Address: 285 Madison Avenue, Borough of Manhattan, City of New York.

To Archibald Palmer, Esq., Attorney for Bankrupt, 2 Lafayette Street, New York City.

[fol. 87] In United States District Court

[Title omitted]

Order Confirming Report of Referee—Sept. 9, 1927

A motion having been made herein by Louis Hulsiman, Trustee of the above named bankrupt, to punish the said Samuel Prela, trading under the firm name and style of Selwell Blouse Company, bankrupt, for contempt of court, in having disobeyed the lawful order of the United States District Court for the Southern District of New York, made by Hon. Francis A. Winslow, District Judge, dated November 9th, 1926, affirming the order of Hon. Peter B. Olney, Jr., Referee in Bankruptcy, dated July 8th, 1926, directing the said bankrupt, Samuel Prela, trading under [fol. 88] the firm name and style of Selwell Blouse Company, to turn over to his said Trustee in Bankruptcy the following goods, wares and merchandise, the money belonging to his estate in bankruptcy, and found to be in his possession and or under his control, and found to be concealed by him, to wit:

1. Goods, wares and merchandise, consisting of 6,4[illegible] yards of silk, or the sum of $8,387.20, as the cash value thereof.

2. Cash in the sum of $436.94, representing proceeds of a check received by the bankrupt from the Equitable Life Assurance Society on or about September 26th, 1924.

3. Cash in the sum of $1,[illegible]90.74, representing the proceeds of four checks for $406.59, $1,30[illegible], $650.29 and

$214.80 each, respectively, received by the bankrupt from the Travelers Insurance Company on or about April 24th, 1924;

and the said motion having come on for a hearing upon an order to show cause, made by this Court, on the 12th day of May, 1927, and the petition of Louis Hubshman, Trustee herein, verified the 22nd day of April, 1927, the affidavit of George Lion Cohen, Esq., sworn to the 12th day of May, 1927, the certificate and report of Hon. Peter B. Olney, Jr., Referee, dated the 13th day of April, 1927, the answering affidavit of Samuel Prela, the bankrupt herein, sworn to the 5th day of July, 1927, and the papers thereto an-
[fol. 89] nexed, and this Court having made a further order under date of July 8th, 1927, referring to Hon. Peter B. Olney, Jr., Referee in Bankruptcy, for hearing testimony and report the issues raised by the papers and pleadings above referred to, as to the ability of the said bankrupt to comply with the turn over order made by this Court, dated the 9th day of November, 1926; and hearings having been held before the said Referee pursuant to said order; and the Referee having filed the testimony taken before him, together with his report thereon, dated August 16th, 1927;

And the said Louis Hubshman, the Trustee herein, having further moved this Court, by a notice of motion dated August 24th, 1927, for an order in all respects confirming the said report of Hon. Peter B. Olney, Jr., Referee in Bankruptcy, dated August 16th, 1927, and for a further order dismissing the answer of the said Samuel Prela, sworn to the 5th day of July, 1927, and for a further order adjudging the said Samuel Prela, the said bankrupt, in contempt of court for his failure to comply with the said order of this Court, and for a further order directing that the said Samuel Prela, the bankrupt herein, be apprehended forthwith by the United States Marshal, and be committed and imprisoned as and for such contempt until he shall obey the order aforesaid, or until the further order of this Court; and the said hearing having duly come on to be heard at a stated term of this Court for motions, held on August 31st, 1927.

[fol. 90] Now, on reading and filing the notice of motion

dated August 24th, 1927, the report of Referee Peter B. Olney, Jr., dated August 16th, 1927, the testimony taken before the said Referee, and the papers and pleadings above referred to; and due deliberation having been had thereon; and after hearing George Lion Cohen, Esq., counsel for the said Trustee, in support of said motion; and Archibald Palmer, Esq., attorney for the said bankrupt, in opposition thereto;

And it appearing to the satisfaction of this Court that the said bankrupt has failed, neglected and refused, and still fails, neglects and refuses to comply with the terms of the said order of this Court, dated November 9th, 1926, affirming and confirming the order of the Referee herein, dated July 8th, 1926; and upon reading and filing the opinion of this Court, it is, on motion of George Lion Cohen, Esq., attorney for said Trustee,

Ordered, adjudged and determined:

I. That the said motion be, and the same hereby is in all respects granted.

II. That the report of the Referee herein, dated August 16th, 1927, be, and the same hereby is in all respects confirmed.

III. That the said bankrupt, Samuel Prela, trading under the firm name and style of Selwell Blouse Company, is [fol. 91] guilty of a contempt of this Court, in having wilfully and deliberately disobeyed said lawful order of the United States District Court for the Southern District of New York, dated November 9th, 1926, confirming the order of the Referee herein, dated July 8th, 1926, and in neglecting and refusing, as in said order directed, to pay over to the said Trustee the following goods, wares and merchandise, and moneys belonging to his estate, and found to be in his possession and withheld or concealed by him from his Trustee in Bankruptcy, more specifically described as follows:

1. Goods, wares and merchandise, consisting of 6,999 yards of silk, or the sum of $8,387.20, as the cash value thereof.

2. Cash in the sum of $436.04, representing proceeds of a check received by the bankrupt from the Equitable Life Assurance Society on or about September 26th, 1924.

3. Cash in the sum of $1,400.74, representing the proceeds of four checks for $405.59, $130.08, $650.29 and $214.80, each, respectively, received by the bankrupt from the Travelers Insurance Company on or about April 24th, 1924.

IV. That Samuel Prela, the said bankrupt, be forthwith arrested by the Marshal of this District and committed to the Ludlow Street Jail, located in the Borough of Manhattan, City of New York, State of New York, Southern District of New York, and he there confined and detained for [fol. 92] his contempt in failing to comply with the terms of the aforesaid order; and it is further

Ordered that the said Marshal of the United States District Court for the Southern District of New York be and he hereby is ordered and directed to forthwith apprehend the said Samuel Prela, the bankrupt above named, and confine and detain him in the Ludlow Street Jail, to be there so detained until the above named bankrupt shall have purged himself of such contempt, and until the further order of this Court; and it is further

Ordered that, in the alternative, the said bankrupt, Samuel Prela, may purge himself of the aforesaid contempt by forthwith turning over to Louis Hubshman, the Trustee herein, the following goods, wares and merchandise, and moneys belonging to his estate, and found to be in his possession and or under his control, and to be withheld and concealed by him from his Trustee in Bankruptcy, more specifically described as follows:

1. Goods, wares and merchandise, consisting of 6,099½ yards of silk, or the sum of $8,387.20, as the cash value thereof.

2. Cash in the sum of $436.04, representing proceeds of a check received by the bankrupt from the Equitable Life Assurance Society on or about September 26th, 1924.

[fol. 93] 3. Cash in the sum of $1,400.74, representing the proceeds of four checks for $405.59, $130.08, $650.29 and $214.80 each, respectively, received by the bankrupt

from the Travelers Insurance Co[illegible]pany on or about April 24th, 1924.

called for by the said order of this Court, dated November 9th, 1926, affirming the order of the Referee herein, dated July 8th, 1926; and it is further

Ordered that this order shall not be enforced until thirty (30) days after the entry thereof.

F. A. Winslow, U. S. D. J.

[fol. 94] In United States District Court

[Title omitted]

Notice of Filing Petition for Appeal

Sir: Please take notice that the original of the within Petition for Appeal and Assignment of Errors has this day been filed in the office of the Clerk of the United States District Court for the Southern District of New York.

Dated September 23rd, 1927.

Yours, &c., Archibald Palmer, Attorney for Bankrupt. Office & P. O. address: No. 2 Lafayette St., Borough of Manhattan, City of New York.

To George Lion Cohen, Esq., attorney for Louis Hufschmann, Esq., trustee in bankruptcy, No. 285 Madison Avenue, Borough of Manhattan, City of New York.

[fol. 95] In United States District Court

[Title omitted]

Petition for Appeal

To the Honorable Judges of the United States District Court for the Southern District of New York:

Samuel Prela, the above named bankrupt, considering himself aggrieved by the order made and entered in this

proceeding on the 9th day of September, 1927, in the above entitled cause, does hereby appeal from such order or judgment to the United States Circuit Court of Appeals for the Second Circuit for the reasons specified in the Assignment of Errors which is filed simultaneously herewith, and he prays that this appeal may be allowed and that a transcript of the record, papers and proceedings upon which such order or judgment was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Circuit.

Dated September 22nd, 1927.

[fol. 96] Samuel Prela, Petitioner. Archibald Palmer, Attorney for Bankrupt. Office & P. O. address: No. 2 Lafayette Street, Borough of Manhattan, City of New York.

Duly sworn to by Samuel Prela. Jurat omitted in printing.

[fol. 97] In United States District Court

Allowance for Appeal

The foregoing appeal is hereby allowed.

F. A. Winslow, U. S. D. J.

Dated Sept. 23, 1927.

In United States District Court

[Title omitted]

Assignments of Error

Now comes Samuel Prela, the above named bankrupt against whom an order was made on the 9th day of September, 1927, adjudging him in contempt of court and directing that he be committed as and for such contempt unless he purges himself by turning over to Louis Hubsh-

man, the Trustee herein, certain goods, wares and merchandise more specifically set forth therein, and which order he claims is erroneous in law and for which he files the following Assignment of Errors:

[fol. 98] (1) That the said order of September 9th, 1927, is contrary to law in all respects.

(2) That the District Court erred in confirming the ruling of the Referee refusing to permit the bankrupt to offer evidence intending to show that as a matter of fact that your petitioner, the bankrupt, was not in possession or control on July 8th, 1926, or prior thereto, of any of the property directed to be turned over by him to Louis Hulshman, as Trustee in Bankruptcy.

(3) The District Court erred in refusing to permit the bankrupt petitioner to offer evidence exonerating him from liability under the turnover order in the manner provided by law.

(4) The District Court erred in confirming the report of the Referee who refused to take any testimony tending to exonerate the bankrupt petitioner from liability under the turnover order in spite of the fact that the order of reference under which the Referee proceeded to take testimony referred to said Referee contained a direction in the following language:

"Ordered, that the issues raised by the aforementioned papers and pleadings as to the ability of the bankrupt to comply with the turnover order dated the 9th of November, 1926, be and the same hereby are referred to Hon. Peter B. Olney, Jr., as Referee, for hearing, testimony [fol. 99] and report, and that such hearings proceed with all convenient speed.

F. A. Winslow, U. S. D. J."

(5) The papers and pleadings which raised the issues as to the ability of the bankrupt petitioner to comply with said turnover order distinctly raised the question as to whether the bankrupt petitioner ever had in his possession the moneys and property alleged to have been all of such property, and that by reason of the refusal of the Referee

to permit such evidence to be adduced on the precise issues thereby raised and the confirmation by the District Court of such refusal on the part of the Referee, that error was committed to the detriment and damage of your petitioner, the bankrupt herein.

(6) The District Court erred in denying to the bankrupt petitioner a full opportunity before the Referee to put in any proofs he might wish to as to whether or not any property belonging to the estate has been concealed or was being concealed which ruling was contrary to withheld by him from his Trustee in Bankruptcy or that he had ever failed to fully account for the law as interpreted by the courts.

(7) The District Court erred in confirming the report of the Referee although the order of reference imposed no limitation on the bankrupt petitioner in respect to the proofs to be adduced in his behalf in an endeavor to ex-[fol. 100] onerate himself from liability under the turnover order except such limitation as is fixed by the papers and pleadings which raised the issues so referred.

(8) The District Court erred in confirming the report of the Referee who struck out and declined to take any testimony or receive any evidence which would have tended to establish that the measure of proof in contempt proceedings deemed criminal had not been established beyond a reasonable doubt, it being the contention of your petitioner, the bankrupt, that he was not shown beyond a reasonable doubt to have had possession of the property when the summary order was entered.

Wherefore your petitioner prays that the order entered herein on the 9th day of September, 1927, be reversed and that the Court be directed to enter an order in accordance with the prayer of the petitioner.

Dated September 22, 1927.

Samuel Prela, Petitioner, by Archibald Palmer, Attorney for Bankrupt Petitioner. Office & P. O. address: No. 2 Lafayette St., Borough of Manhattan, city of New York.

[fol. 101] Citation, in usual form, omitted in printing.

[fol. 102] In United States Circuit Court of Appeals for the Second Judicial Circuit

In the Matter of Samuel Prela, Trading as Selwell Blouse Company, Bankrupt-Petitioner

Notice of Motion for Leave to Appeal

Sir: Please take notice that upon the annexed petition of Samuel Prela, above named, duly verified the 29th day of September, 1927, and upon all the other papers and proceedings heretofore had herein, the undersigned will move this Court, at a Stated Term thereof, to be held in the Court Room at the Post Office Building, in the Borough of Manhattan, City of New York, on the 3rd day of October, 1927, at ten-thirty o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, for leave to appeal to the United States Circuit Court of Appeals for the Second Judicial Circuit, from the order made by Hon. Francis A. Winslow, United States District Judge, on the 9th day of September, 1927, and for such other and further [fol. 103] relief as to the Court may seem just and proper.

Dated September 29th, 1927.

Yours, etc., Archibald Palmer, Attorney for Bankrupt-Petitioner. Office & P. O. address: No. 2 Lafayette Street, Man., New York City.

To George Lion Cohen, Esq., Attorney for Trustee. Office & P. O. address: No. 285 Madison Avenue, Man., New York City.

[fol. 104] In United States Circuit Court of Appeals

[Title omitted]

Petition of Samuel Prela for Appeal

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Judicial Circuit:

The Petition of Samuel Prela respectfully shows to this Court and alleges:

First. That heretofore and on the 22nd day of November, 1924, a petition in involuntary bankruptcy was filed against your petitioner in the office of the Clerk of the

United States District Court for the Southern District of New York and your petitioner was thereafter adjudicated a bankrupt, resulting in the election of one Louis Hubshman as Trustee of the estate of your petitioner, as such bankrupt.

Second. That on the said date of adjudication the proceedings were referred to Hon. Peter B. Olney, Jr., as [fol. 105] Referee in Bankruptcy, before whom a proceeding was thereafter commenced to compel your petitioner to turn over to said Trustee in Bankruptcy certain goods, wares and merchandise and moneys alleged by said Trustee to have been concealed and withheld by your petitioner and which should have been turned over to the Trustee for administration for the benefit of the creditors of this estate.

Third. The hearings before the said Referee on the turnover application were concluded and resulted in the entry of an order by the Referee, on the 8th day of July, 1926, directing your petitioner to turn over to the said Trustee the following:

(a) Goods, wares and merchandise consisting of 6,099½ yards of silk, or the sum of $8,387.20 as the cash value thereof.

(b) Cash in the sum of $436.04, representing proceeds of a check received by petitioner from the Equitable Life Assurance Society on or about September 26th, 1924.

(c) Cash in the sum of $1,400.74, representing the proceeds of four checks for $405.59, $130.06, $650.29 and $214.80, each, respectively, received by the bankrupt from the Travelers Insurance Company on or about April 24th, 1924.

Fourth. Your petitioner sought a review of the said order, which review came on before the District Court and [fol. 106] an order was entered on the 9th day of November, 1926, confirming the order of the Reberee and directing that the said goods, wares, merchandise and moneys as afore-1926, confirming the order of the Referee and directing that said, be paid over to the Trustee or that your petitioner account to the said Trustee for the same within ten days of the entry of said order.

Fifth. Your petitioner, feeling aggrieved by the entry of the said order, endeavored, through Messrs. Steinberg & Levin, counsel then representing him, to obtain leave to appeal to this Court from the said order entered on the 9th day of November, 1926, but the application was refused and your petitioner was then without any appellate relief.

Sixth. Your petitioner then sought before the District Court to obtain an opportunity for a further hearing and for an order directing that the turnover proceedings be referred back to the Referee to take such further testimony as the Court may thereafter direct and for an order vacating the turnover order. This application came on before the District Court upon the petition of your petitioner and was based substantially upon the following facts:

Your petitioner had been engaged in business as a manufacturer of waists, blouses and tunics, all of which are articles of ladies' wearing apparel. The principal theory of the Trustee's case against your petitioner was that the merchandise which was the product of your petitioner's factory was principally blouses, which required only one [fol. 107] and a half yards of material per blouse and that consequently only eighteen yards of material were consumed in the manufacture of each dozen of blouses produced in the course of such business. The Referee, in his report on the original turnover application, made such a finding, to wit:

"I find that the kind of blouses manufactured by the bankrupt in the ordinary course of trade required 1½ yards of material per blouse. The average price paid per yard was $1.39."

It was obvious, therefore, that the affirmation of the order of the Referee directing your petitioner to turn over 6,080½ yards of silk was based upon the supposition that only one-and-a-half yards of material per blouse was required and that in view of the fact that there was not sufficient blouses accounted for, either in sales or remaining in the premises at the time of bankruptcy, that your petitioner was chargeable with the difference, either in yardage or manufactured product.

Your petitioner endeavored to explain to the Referee, in connection with his testimony, that the product manufactured by your petitioner required far in excess of the supposed quantity of material necessary to manufacture blouses, inasmuch as your petitioner manufactured mainly tunics and not blouses, and that such tunics required from twenty-two to twenty five yards of material per dozen. The [fol. 108] Referee declined to believe your petitioner's explanation, making the following comment:

"The bankrupt's attempted explanation was based on his own uncorroborated and discredited testimony that he was, during the period in question, manufacturing mainly tunics and not blouses. It appeared to my satisfaction that tunics required more material than blouses. I do not believe the bankrupt's testimony in this connection and I find that the Trustee has sustained the burden of proving concealment."

In the course of the hearings on the said turnover application, one Milton Hirsch gave testimony, upon whose testimony the Referee relied in accepting the figure of one-and a-half yards of material to make a blouse. Your petitioner represents that the said Hirsch, who was your petitioner's largest creditor, never having been in business as a manufacturer of blouses, was in no position to give testimony upon which great reliance should have been placed.

Seventh. Your petitioner further set forth in the said application that inasmuch as the theory followed by the Referee on the turnover application was predicated upon a misconception and misconstruction of the facts, that he was entitled to a further hearing in an effort to demonstrate that at no time did your petitioner ever conceal a single dollar's worth of merchandise or a single dollar belonging to his estate.

[fol. 109] Eighth. In support and in substantiation of the facts set forth in the petition of your petitioner there was submitted to the District Court, on the application for re-argument, affidavits of Philip Goldfrank and Philip Diamond, substantial customers of your petitioner during the year of 1924, preceding the filing of the petition in bank-

ruptcy, who were prepared to testify that the greater portion of purchases made by them were of tunics and not blouses. There was also submitted the affidavit of Jacob Rosen, who was employed by your petitioner as salesman in the year 1924 and who was prepared to testify that the greatest majority of the sales during that period consisted of tunics, and the affidavit of Jacob Cohen, now in business for himself but who, at that time, was employed as a cutter in your petitioner's business, who was prepared to testify that the greatest portion of merchandise cut for manufacture in the business of your petitioner was that of tunics.

Ninth. The object of these affidavits and the testimony offered was to substantiate the contention of your petitioner that tunics required from twenty-two to twenty-five yards of material per dozen in the manufacture thereof and that an accurate calculation of the product of your petitioner's factory, based upon the actual number of yards required and consumed, would completely account for the discrepancy which the Trustee alleged existed.

Tenth. As to the moneys charged to have been concealed and withheld by your petitioner, your petitioner offered [fol. 110] the affidavits and testimony of Mollie Prela, your petitioner's wife, indicating that as far back as six months preceding the filing of the petition in bankruptcy these moneys were turned over to her and deposited by her in a bank account which she maintained for a period of twenty years prior thereto and were used to defray medical expenses incurred by her by reason of an illness from which the said Mollie Prela has not yet fully recovered.

Eleventh. This application of your petitioner for a reargument was considered by the District Court and was denied.

Twelfth. An order was then made directing your petitioner to show cause before this Court why he should not be adjudged in contempt for failure to comply with the said order directing your petitioner to turn over the aforesaid goods, wares, merchandise and moneys and why your petitioner should not be imprisoned until he shall obey the order or until the further order of the Court.

Thirteenth. In response to the petition of the Trustee, upon which this order to show cause was made, your petitioner submitted his own petition in answer, together with the following papers, the affidavit of Philip Goldfrank, sworn to the 29th day of November, 1926; affidavit of the New York Waist House, Inc., sworn to the 3rd day of [fol. 111] December, 1926; the affidavit of Jacob Rosen, sworn to the 3rd day of December, 1926; the affidavit of Jacob Cohen, sworn to the 7th day of December, 1926, and the affidavit of Mollie Prela, sworn to the 18th day of December, 1926. These affidavits raised a distinct issue as to whether or not your petitioner ever had possession or control of this merchandise and moneys at any time subsequent to the filing of the petition in bankruptcy or the power with which to comply with the said order, all of which your petitioner has consistently denied, and upon consideration of the petition of the Trustee and all of the answering affidavits and petition of your petitioner the District Court made its memorandum as follows:

"The question as to the ability only of the bankrupt to comply with the summary order will be referred to Referee Olney. See re J. H. Small Shoe Company, ex parte, Mary G. Potter, Trustee, etc.

F. A. Winslow, U. S. D. J."

July 7th, 1927.

and the Court made its order on the 8th day of July, 1927, concluding with the following language:

"Ordered, that the issues raised by the aforementioned papers and pleadings as to the ability of the bankrupt to comply with the turnover order dated the 9th day of November, 1926, be, and the same hereby are, referred to Hon. [fol. 112] Peter B. Olney, Jr., as Referee, for hearing, testimony and report and that such hearings proceed with all convenient speed.

F. A. Winslow, U. S. D. J."

Fourteenth. Your petitioner then proceeded on the hearings before the said Referee in an endeavor to explain his inability to comply with the turnover order and offered

testimony on all the issues raised by all of the aforementioned papers and pleadings, distinctly in accordance with the terms of the order made by the District Court, as above stated.

Fifteenth. The Referee declined to take any testimony designed to show that as a matter of fact your petitioner was not in possession or control, on the 8th day of July, 1926, or prior thereto, of any of the property which, by order of July 8th, 1926, was found to be in your petitioner's possession and control. Your petitioner was limited by the Referee to proof of the disposition of the property from the date of the entry of such order.

Sixteenth. That it was impossible for your petitioner to submit any such proof inasmuch as your petitioner endeavored to explain to the District Court and the Referee that on July 8th, 1926, he had no such merchandise or moneys in his possession or control and that he was therefore unable to comply with such a turnover order and that [fol. 113] all that your petitioner sought was an opportunity to explain the reasons for his inability to make such compliance.

Seventeenth. If your petitioner attempted to follow the ruling of the Referee, to wit, to explain the disposition of the property commencing with the date of July 8th, 1926, it would have been an acceptance of the accuracy and correctness of the order which your petitioner has, at all times, consistently disputed. Furthermore the order of reference as to the ability of your petitioner to comply with the said turnover order in no wise limited the proof to be adduced for the order distinctly states that the issues raised by all of the papers and pleadings referred to therein be heard and that therefore the limitation imposed by the Referee was unwarranted and unfair.

Eighteenth. Your petitioner, through his counsel, moved before the District Court for instructions to the Referee so that no unfair limitation might be placed upon such testimony and such proofs but the District Court declined to give such instructions and the application was denied.

Nineteenth. The hearings proceeded before the Referee and because of the inability of your petitioner to even at

tempt to explain the disposition of the property, commencing with the 8th day of July, 1926, because your petitioner refused to accept the order as accurate, the Referee made [fol. 114] his report that no evidence was either produced or offered to show what was done with the property since that date. A recommendation was then made that your petitioner be punished for such contempt.

Twentieth. This report came on before the District Court for consideration and an order was made on the 9th day of September, 1927, confirming the report of the Referee, adjudging your petitioner in contempt, but staying the enforcement of such order until thirty days after the entry thereof in order that your petitioner might appeal therefrom.

Twenty first. That on the 23rd day of September, 1927, your petitioner duly presented his petition for appeal to Hon. Francis A. Winslow, the District Judge who made the order finding your petitioner in contempt, and the said appeal was allowed.

Twenty second. In order that there may be no question as to the right of your petitioner to have a full opportunity in an endeavor to exonerate himself from liability under the turnover order and because of the uncertainty surrounding appeals, as provided for by Sections 24B and 25A of the Bankruptcy Act, your petitioner prays that this Court make its order allowing such appeal.

Twenty-third. Your petitioner is informed that In re Small, 16 Fed., 2nd Cir., 205, provided a person then a [fol. 115] respondent in a turnover order with a right to demand that he be shown beyond a reasonable doubt to have had possession of the property when the summary order was entered.

Twenty fourth. Your petitioner is informed that the order in the Small case, when entered, presented prima facie possession of a fund. A mere bare denial, without any corroborative proof, was, of course, insufficient to overcome such prima facie case of possession. The Court in re Small cited the opinions of this Court

In re Stavrahn, 147 Fed., 330;
In re Weber, 200 Fed., 404.

In the latter case Circuit Judge Lacombe found that the bankrupt had full opportunity, before the Referee, to put in any proofs he might have wished to as to whether or not he was concealing the sum of $10,000.00. The bankrupt made no opposition to the finding of the Referee that he was concealing that sum, did not seek to review it in any way nor had he asked for a reopening on the strength of new testimony or for any other reason. Judge Lacombe held further, however, the following:

"If he has been misadvised and finds himself for that reason in the position of being punished for not doing what it was impossible to do, presumably upon an application to purge himself of the contempt he would be allowed to sub-[fol. 116] mit evidence to show facts exonerating him, which he has heretofore failed to do."

In the case at bar the Referee declined to accept any testimony offered by your petitioner to explain his inability to comply with the turnover order, although the order of reference made by the District Court directed that all the issues on all of the pleadings be heard.

Twenty fifth. In the case at bar your petitioner strenuously opposed the turnover proceedings, sought a review before the District Court, a further review before this Court and sought before the District Court to establish, upon a rehearing, the impossibility of compliance with the turnover order. In other words, the very course of procedure outlined by Judge Lacombe In re Weber, supra, to wit, the making of an application on the part of the bankrupt to submit evidence to show facts exonerating him, was the course pursued by your petitioner and yet when evidence was offered the same was limited to such an extent as to prove valueless. In re Stavrahn, supra, cited In re Small, supra, the bankrupt merely filed an affidavit, the sole averment of which was that he did not have the moneys [fol. 117] directed to be paid over in his possession and had no means of obtaining the same. The Circuit Court properly held that this averment was too bald and indefinite to have any persuasive force and accordingly affirmed the order of commitment. Your petitioner, in the course of the proceedings before the Referee and the District Court,

offered no uncorroborated or unsupported testimony but, on the contrary, offered the testimony of persons who were in a position to truthfully state facts and circumstances tending to explain your petitioner's inability to comply with such turnover order.

Twenty-sixth. Your petitioner, through counsel, has insisted and still insists that, as a matter of right and as a matter of law, your petitioner was entitled to establish all of the evidence available upon all of the issues raised by the papers and pleadings set forth in the order of reference made by the District Court on the 8th day of July, 1927 all of which, your petitioner contends, would have established that he was not shown, beyond a reasonable doubt, to have had possession of the property when the order was made.

Twenty seventh. Your petitioner therefore respectfully submits that under the law as interpreted by Judge Lacombe, it is distinctly held that a bankrupt in the same position as your petitioner is entitled to an opportunity to exonerate himself from liability under the turnover order. That such an opportunity was improperly and unjustifiably [fol. 118] denied to your petitioner and that because of such refusal your petitioner is in grave danger of being committed for failure to comply with a turnover order with which your petitioner utterly is unable to comply with because of the foregoing facts.

Twenty-eighth. Your petitioner respectfully represents that no harm could have been suffered by the Trustee in protecting the interests of the creditors if a full hearing were had upon all of the issues as to the ability of your petitioner to comply with the said turnover order, for if after a full hearing before the said Referee the original finding is sustained the Trustee will have the same remedy in the future that he has today, but, on the other hand, if after such a full and complete hearing as your petitioner is entitled to receive, your petitioner succeeds in exonerating himself of such liability under the turnover order grave injustice will have been avoided.

Twenty-ninth. Your petitioner therefore prays that this Court allow the appeal to be taken by your petitioner, as provided for by the order of the District Court, dated the

23rd day of September, 1927, for all of which relief no previous application has been made, except as herein stated.

Dated September 29th, 1927.

Samuel Prela.

[fol. 119] *Duly sworn to by Samuel Prela. Jurat omitted in printing.*

[fol. 120] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ANSWER OF LOUIS HUBSHMAN TO PETITION FOR LEAVE TO APPEAL.

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Judicial Circuit:

Louis Hubshman, the Trustee herein, answering the petition of the bankrupt herein, respectfully shows to this Court and alleges:

I. The Trustee admits the allegations contained in paragraphs First, Second, Third, Fourth and Fifth.

II. The Trustee admits the allegations set forth in the paragraph marked Sixth of the said petition that the bankrupt herein, after being denied leave to appeal to the Circuit Court, sought a rehearing before the District Court upon the turn over order, but, except as herein admitted, denies each and every allegation therein contained, and [fol. 121] respectfully begs leave to refer to the opinion of the Hon. Francis A. Winslow, District Judge, and the order entered thereon and the proceedings had therein.

III. The Trustee denies the allegations contained in paragraph Seventh.

IV. Answering the allegations contained in paragraphs Eighth, Ninth and Tenth of the said petition, the Trustee respectfully sets forth that the same are immaterial and incompetent. The hearings before the referee continued over a period of a year. There was ample opportunity for the bankrupt to call any witnesses he desired. He

failed to call the witnesses mentioned in said paragraph. No explanation was given why these witnesses were not called during the hearings. These witnesses were in existence and what they would testify to must have been known to the bankrupt at all times while the hearings before the referee were in progress.

V. The Trustee admits the allegations contained in paragraph Eleventh of the petition and begs leave to quote the opinion of Hon. Francis A. Winslow, District Judge, in denying said application. Said opinion is as follows:

"I have given careful consideration to the petition for reargument. I seriously doubt the power of this court to even consider the application in view of the conclusion of the Circuit Court of Appeals. In any event, the record [fol. 122] does not justify a reargument. There must be some finality to the proceeding. Application for reargument denied. Dated, January 29, 1927."

VI. The Trustee admits the allegations set forth in paragraph Twelfth of the petition.

VII. Answering paragraph marked Thirteenth of the petition, the Trustee admits that the said papers were submitted by the bankrupt but denies that the said papers raised the issue as to whether or not the bankrupt ever had in his possession or control the merchandise and moneys at any time subsequent to the filing of the petition in bankruptcy. The Trustee respectfully contends that the only issue raised by these pleadings is that made in the memorandum by Judge Winslow which reads as follows:

"The question as to the ability only of the bankrupt to comply with the summary order will be referred to Referee Olney. See J. M. Small Shoe Co., ex parte, Mary G. Potter, Trustee, etc. Francis A. Winslow, July 7, 1927."

The Trustee respectfully sets forth that the order referred to dated the 8th day of July, 1927, was prepared by the attorney for the bankrupt and entered by him and that no appeal from said order was taken by the attorney for the bankrupt.

[fol. 123] VIII. Answering paragraph marked Fourteenth of the said petition, Trustee denies each and every allegation set forth therein and respectfully refers to the memorandum of Hon. Peter B. Olney, Jr., Referee in Bankruptcy, which is clear and concise as to what transpired at these hearings before the Referee.

IX. The Trustee admits the allegations contained in paragraph Fifteenth of said petition and submits that the Referee did not err in acting as therein set forth.

X. Trustee denies the allegations contained in paragraphs Sixteenth and Seventeenth of said petition.

XI. The Trustee admits the allegations contained in paragraph Eighteenth and respectfully sets forth that the reasons why Judge Knox refused to give instructions to the Referee were that the order of July 8th, 1927, made by Judge Winslow was clear and that instructions were neither proper nor necessary.

XII. The Trustee denies the allegations contained in paragraph Nineteenth of said petition, except that the Trustee admits that the hearings proceeded before the referee and that a recommendation was made that the bankrupt be punished for a contempt.

XIII. The Trustee admits the allegations contained in paragraph Twenty of the petition but desires to call to the [fol. 124] attention of this court the fact that the order confirming the report of the referee and adjudging the bankrupt in contempt was heard and decided by Hon. Francis A. Winslow, District Judge, who had originally confirmed the referee's order directing the turn over and who had subsequently denied a rehearing of the said motion to confirm the referee's report after this Honorable Court had refused to grant leave to appeal therefrom and who had also heard the motion directing the bankrupt to show cause why he should not be punished for a contempt and had made the order of July 8th, 1927, referring the issues to Hon. Peter B. Olney, Jr., Referee in Bankruptcy.

XIV. The Trustee admits the allegations contained in paragraph Twenty first of said petition but is advised that the procedure followed by the bankrupt in presenting the

petition for appeal to Hon. Francis A. Winslow was not proper practice in view of the rules of this Court and the bankruptcy laws.

XV. The Trustee denies each and every allegation contained in paragraphs Twenty-second, Twenty-third and Twenty-fifth and respectfully refers to the conclusions of the law in the cases therein cited.

XVI. The Trustee denies the allegations contained in paragraph Twenty-sixth and respectfully alleges that the bankrupt has had more than his full day in court, and he had every opportunity that the ingenuity of his several [fol. 125] counsel could invent. From the words of Judge Winslow "there must be some finality to these proceeding."

XVII. The Trustee denies the allegations contained in paragraphs Twenty-seventh and Twenty-eighth.

For a first, separate and additional answer to the petition of the bankrupt herein, the Trustee herein respectfully sets forth and alleges:

XVIII. Louis Hulshman was duly elected Trustee of the above named bankrupt on or about the 20th day of January, 1925.

XIX. That a Creditors' Committee composed of a number of leading creditors aided in the investigation of the affairs of the bankrupt.

XX. That pursuant to an order made by the referee herein the books of the bankrupt were examined by certified public accountants.

XXI. That thereafter, on July 3, 1925, the Trustee herein commenced a turn over proceeding asking that the bankrupt be directed to show cause why he should not be ordered and directed to turn over and deliver certain assets of the bankrupt's estate.

XXII. After the bankrupt answered, numerous hearings were held and the testimony of numerous witnesses was [fol. 126] taken. Hearings were held in July, September,

October, November and December, 1925, and in February and June, 1926.

XXIII. At these hearings, the Trustee called a number of witnesses and introduced much documentary evidence. Some of the testimony against the bankrupt was extracted from the bankrupt himself, from William Klein, his brother-in-law, and one of his employees. Though these hearings continued for almost eleven months and the bankrupt had ample opportunity to present all evidence, he did not call as witnesses any of the persons mentioned in his affidavit.

XXIV. After the aforesaid hearings, the referee rendered a memorandum opinion on June 30, 1926. An order was entered on July 8th, 1926. When the matter came up upon a petition for review the order was affirmed by Hon. Francis A. Winslow.

XXV. The Referee in his memorandum said in part as follows:

"Bankrupt's attempted explanation was based on his uncorroborated and discredited testimony * * *. Bankrupt's explanation of what he did with the proceeds of this check, which he cashed with a friend, is to my mind, entirely unsatisfactory and unconvincing. Bankrupt undertook to testify that his wife spent it (the money); that she was sick and went away to the country for a few weeks; [fol. 127] and she spent it. Bankrupt's wife was the obvious person to explain what she did with the money. Though no reason was shown why it was not perfectly possible and feasible to do so, bankrupt's wife was not called as a witness."

XXVI. When the petition for a review came up before the Hon. Francis A. Winslow, one of the Judges of the United States District Court, the matter was argued at length by George Lion Cohen, Esq., attorney for the Trustee, and by Louis H. Levin, Esq., of counsel to the bankrupt, and in addition there was submitted on behalf of the bankrupt a brief consisting of 65 pages and on behalf of the Trustee a brief of 40 pages. Both briefs reviewed the facts thoroughly.

XXVII. Thereafter the bankrupt made a motion to the Circuit Court of Appeals for leave to appeal to that court. When said application came on before Judges Hough, Mack and Learned Hand on December 6th, 1926, the bankrupt submitted an Assignment of Errors, and after argument, the learned Judges of this court unanimously decided that the application for leave to appeal be denied.

XXVIII. That thereafter the bankrupt applied to the Hon. Francis A. Winslow for a rehearing. In denying this action Judge Winslow wrote the opinion hereinbefore set forth in paragraph "V" hereof.

[fol. 128] XXIX. The proceedings which were had after Judge Winslow denied the rehearing are set forth in the petition of the bankrupt.

XXX. The bankrupt's schedules filed herein show total liabilities at the time the petition was filed amounting to $23,701.31. Though the assets are scheduled at $10,876.49, as a matter of fact the actual assets are less than $4,000.00. There was uncontradicted evidence in this proceeding to the effect that on January 1st, 1924, the bankrupt's books showed that his assets exceeded his liabilities by more than $12,000.00. Thus, in a period of eleven months preceding the bankruptcy, the bankrupt dissipated between $25,000.00, according to his own estimate, and $31,000.00 according to the actual figures.

XXXI. The bankrupt conducted a small business, with low operating expenses, and his business was well run. He kept a set of books, and retained the same employees throughout his business career and at no stage of these proceedings did he complain about his employees.

XXXII. The sum of $10,223.00 which the trustee was able to trace to the bankrupt is undoubtedly part of a larger sum concealed by the bankrupt.

XXXIII. The turn over order in this proceeding was based upon the assumption that the bankrupt had no merchandise in his possession on September 1st, 1924, three months before the petition was filed. If the bankrupt, in [fol. 129] fact, did have merchandise, as undoubtedly he did, the amount for which the bankrupt would be chargeable would have been larger than the said sum of $10,223.00.

XXIV. The referee has found as a fact that the bankrupt had in his possession and was concealing the items mentioned in the turn over order. These findings were affirmed by the District Court. Leave to appeal was denied by this learned court and an application for a rehearing denied by the District Court. A motion was made to show cause why the bankrupt should not be punished for contempt. That matter was heard on two occasions by the District Court, and hearings were held before the referee. The trustee submits that if the bankrupt is permitted at this late date to question the findings of the courts, there will never be any finality to these bankruptcy proceedings and the turn over orders will be meaningless.

XXXV. No new evidence is claimed to have been discovered by the bankrupt. He had ample opportunity to question everything before the referee, and he used this opportunity to the fullest advantage. The bankrupt knew with whom he was dealing, and he knew the names of his employees. He could have called these people. Every effort to question the bankrupt as to his business relations resulted in an answer of "I don't know" or "I don't remember." The bankrupt was evasive throughout.

[fol. 130] Wherefore the Trustee respectfully prays that the application of the bankrupt herein for leave to appeal to this court be denied and for such other and further relief as to this court may seem just and proper.

Dated New York, October 3rd, 1927.

Louis Hubshman, Trustee.

Duly sworn to by Louis Hubshman. Jurat omitted in printing.

[fol. 131] In United States Circuit Court of Appeals

[Title omitted]

Order Granting Leave to Appeal—Oct. 10, 1927

A motion having been made herein by counsel for the bankrupt for leave to appeal from a certain order of the District Court for the Southern District of New York,

Upon consideration thereof it is
[fol. 132] Ordered that said motion be and hereby is granted.

M. T. M., L. H.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby stipulated and agreed that the record on appeal from the order dated September 9th, 1927, adjudging the above named bankrupt in contempt, shall contain the folowing papers:

1. Memorandum opinion of Hon. Peter B. Olney, Jr., dated June 30th, 1926.

2. Order of Hon. Peter B. Olney, Jr., dated July 8th, 1926, entered upon said memorandum opinion.

[fol. 133] 3. Order of Hon. Francis A. Winslow, United States District Judge, dated November 9th, 1926, confirming order of Referee, dated July 8th, 1926.

4. Report and certificate of Hon. Peter B. Olney, Jr., dated April 13th, 1927, together with affidavits of Louis Hulshman, sworn to April 11th, 1927, and James D'Agostino, sworn to January 22nd, 1927, annexed thereto.

5. Order to show cause, of Hon. Henry W. Goddard, dated May 12th, 1927, together with petition of Louis Hulshman, trustee, verified April 22nd, 1927, and affidavit of George Lion Cohen, Esq., sworn to May 12th, 1927, thereto annexed.

6. Answer of Samuel Prela, verified July 5th, 1927, and the following papers annexed thereto: Affidavit of Mollie Prela, sworn to December 18th, 1926; affidavit of Philip Goldfrank, sworn to November 29th, 1926; affidavit of Jacob Cohen, sworn to December 7th, 1926; affidavit of Jacob Rosen, sworn to December 3rd, 1926; affidavit of Philip Diamond, sworn to December 3rd, 1926.

7. Memorandum opinion of Hon. Francis A. Winslow, District Judge, dated July 7th, 1927.

8. Order of Hon. Francis A. Winslow, District Judge, dated July 8th, 1927.

[fol. 134] 9. Stenographic record of testimony before Hon. Peter B. Olney, Jr., Referee in Bankruptcy, taken upon hearing of order of Judge Winslow, on the following dates: July 12th, 1927, July 19th, 1927 and July 25th, 1927.

10. Notice of motion for instructions to Referee, made by the bankrupt, dated July 15th, 1927.

11. Memorandum opinion of Hon. John C. Knox, dated July 20th, 1927, upon deciding said motion.

12. Order of Hon. John C. Knox, denying the motion for instructions, dated July 21st, 1927.

13. Report of Hon. Peter B. Olney, Jr., Referee in Bankruptcy, dated August 16th, 1927.

14. Notice of motion to confirm report of Referee, dated August 24th, 1927.

15. Order of Judge Winslow, dated September 9th, 1927, confirming said report, and directing that the bankrupt be punished.

16. Petition for appeal of Samuel Prela, verified September 22nd, 1927, with endorsement of allowance thereof by Hon. Francis A. Winslow.

[fol. 135] 17. Assignment of errors, dated September 22nd, 1927.

18. Citation on appeal, dated September 23rd, 1927.

19. Notice of motion for leave to appeal to the United States Circuit Court of Appeals, dated September 29th, 1927, and petition of Samuel Prela, verified September 29th, 1927, thereto annexed.

20. Answer of Louis Hubshman to petition for leave to appeal, verified October 3rd, 1927.

21. Order of Hon. Martin T. Manton and Hon. Learned Hand, Circuit Court Judges, dated October 10th, 1927, allowing appeal.

Dated New York, October 17th, 1927.
Archibald Palmer, Attorney for Bankrupt-Appellant.

Items 1 to 21 as originally written without modifications.
George Lion Cohen, Attorney for Trustee-Respondent.

Oct. 21, 1927, 3:40 P. M.

[fol. 136] In United States District Court

[Title omitted]

Stipulation re Transcript of Record

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated October 29th, 1927.

Archibald Palmer, Attorney for Appellant. George Lion Cohen, Attorney for Trustee.

[fol. 137] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 138] United States Circuit Court of Appeals for the Second Circuit, October Term, 1927

No. 197

Argued December 9, 1927. Decided January 9, 1928.

In the Matter of Samuel Pella, Trading as Selwell Blouse Company, Bankrupt-Appellant

Appeal from the District Court of the United States for the Southern District of New York

Before Manton, L. Hand, and Swan, Circuit Judges

Opinion

Appeal from the District Court for the Southern District of New York. An order was entered punishing the bankrupt for contempt of court in having willfully disobeyed an order directing him to deliver over to his trustee merchandise and money, and committing him to imprisonment for failure so to do. Order affirmed.

Archibald Palmer, of New York City (Max L. Rosenstein, of New York City, of counsel), for appellant.

George Lion Cohen, of New York City, for appellee.

MANTON, Circuit Judge:

The appellant was adjudicated a bankrupt, and thereafter was directed to turn over to his trustee merchandise and pay over money. He failed to do so. A motion was made to punish him for contempt, which resulted in the order appealed from. The motion to direct the appellant to turn over the property in question was referred to the referee in bankruptcy, who took testimony in a protracted proceeding. The appellant had full opportunity to present all his evidence, but called no witnesses to support his present affidavit, which sets forth an excuse in opposition to the order appealed from. The referee's order, directing him to turn over the property dated November 9, 1926, was affirmed by the District Judge. An application was made to this court for leave to appeal, which was denied. A reargument of the motion to turn over was applied for in the District Court, and denied. Thereupon the trustee, upon affidavits, moved to punish for contempt. An answer was interposed, and affidavits in opposition were filed. The matter was again referred to the referee in bankruptcy, who took testimony; but he held that the order in the turnover proceedings made out a prima facie case against the bankrupt; and that the burden was on the bankrupt to go forward with evidence tending to show that since the date of the turnover order he had disposed of the property then found to be in his possession or control, and directed to be turned over to the trustee. No evidence was offered by the bankrupt to show what he had done with the property since he was adjudged a bankrupt. The District Court affirmed the report of the referee and adjudged the bankrupt in contempt.

On this appeal it is argued that it was error below to refuse an opportunity to the appellant to explain (1) his inability to comply with the turnover order; and (2) that the appellee had failed to establish beyond a reasonable doubt the fact that the appellant was concealing moneys and properties of the bankrupt; and (3) that there is a failure of proof to sustain the claim that the appellant is presently able to comply with the order to turn over the property.

These claims were advanced in the Matter of Oriel et al., 22 F. (2d) —, decided this day, and for the reasons there

stated, and upon that authority, we hold that a motion to punish for contempt for failure to obey a turnover order [fol. 139] is a civil proceeding. A disobedience of the order to turn over presents a prima facie case of contumacy for punishment. The burden rests upon the moving party to establish, not beyond a reasonable doubt, but by a fair preponderance of proof, such contumacy. Having been directed to turn over property, it is presumed that the offender continues in his willful and deliberate conduct when he fails to obey the order. Applying the rule stated in that opinion, it follows that this order must be affirmed.

Order affirmed.

L. Hand, Circuit Judge, dissents.

[fol. 140] In United States Circuit Court of Appeals, Second Circuit

[Title omitted]

Decree—Filed Jan. 16, 1928

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be, and it hereby is, affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

M. T. M., T. W. S.

[fol. 141] [File endorsement omitted.]

[fol. 142] Certificate of William Parkin, Clerk of U. S. C. C. A., Second Circuit, to the foregoing transcript omitted in printing.

[fol. 143] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 23, 1928

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 33,289. U. S. Circuit Court of Appeals, Second Circuit. Term No. 91. Samuel Prela, trading as Selwell Blouse Company, petitioner, vs. Louis Hubshman, trustee in bankruptcy of Samuel Prela, trading as Selwell Blouse Company. Petition for writ of certiorari and exhibit thereto. Filed March 12th, 1928. File No. 33,289.

Supreme Court, U. S.
FILED
MAR 19 1928
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 8[redacted] 91

SAMUEL PEELA, TRADING AS SELWELL BLOUSE COMPANY, PETITIONER,

v.

LOUIS HUBSHMAN, TRUSTEE IN BANKRUPTCY OF SAMUEL PEELA, TRADING AS SELWELL BLOUSE COMPANY.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

ARCHIBALD PALMER,
Counsel for Petitioner.

MAX L. ROSENSTEIN,
Of Counsel.

(33,289)

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STATUTES CITED.

National Bankruptcy Act, Section 11, Subdivision 13	2, 6
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 837

SAMUEL PRELA, TRADING AS SELWELL BLOUSE COMPANY, PETITIONER,

against

LOUIS HUBSHMAN, TRUSTEE IN BANKRUPTCY OF SAMUEL PRELA, TRADING AS SELWELL BLOUSE COMPANY, RESPONDENT.

To the Honorable the Chief Justice and Associated Justices of the Supreme Court of the United States:

The petitioner above named, pursuant to leave granted to him by the United States Circuit Court of Appeals for the Second Circuit on the 6th day of February, 1928, hereby submits his petition to review a judgment of that court rendered on the 9th day of January, 1928 (R., 138), which affirmed an order of the United States District Court for the Southern District of New York adjudging the petitioner in contempt of court for failure to comply with the terms of a turn-

over order made against your petitioner, and the imprisonment of your petitioner is sought under Section 11, Subdivision 13 of the National Bankruptcy Act, the original turnover order being presumably based upon the provisions of Section 11, Subdivision 7.

Statement of the Case.

An involuntary petition in bankruptcy was filed on the 22d day of November, 1924, against the bankrupt. At the time of his bankruptcy he was engaged in business as a manufacturer of tunics and blouses, the same being articles of ladies' wearing apparel. An adjudication in bankruptcy followed and a trustee elected.

A turnover proceeding was commenced by the trustee seeking to recover 6,124½ yards of silk valued at $8,512.70, or the proceeds of the sale thereof, alleged to have been unaccounted for by the bankrupt. In addition, the trustee sought to obtain the return of cash amounting in the aggregate to $1,836.78 (Record, fols. 10 to 15).

The referee in bankruptcy found for the trustee and directed that the merchandise and moneys claimed by the trustee be turned over by the bankrupt. The finding of the referee was predicated upon the hypothesis that the kind of blouses manufactured by petitioner in the ordinary course of trade required one and one-half yards of material per blouse (Record, fol. 3).

The referee disbelieved the testimony of the bankrupt that the principal product of the bankrupt's factory was tunics, which required approximately twenty-five yards of material to the dozen. The referee de-

clined to accept the explanation that the cash aggregating $1,836.78 was accounted for by the bankrupt, the same having been disposed of as far back as six months preceding the filing of the petition in bankruptcy.

The referee's order having been affirmed by the district court, an application for leave to appeal therefrom was denied by the circuit court of appeals.

Upon an application to punish the bankrupt for contempt for failure to comply with the turnover order, certain issues were raised by the answer of the bankrupt and supporting affidavits tending to show that none of the property required to be turned over by the turnover order was in fact concealed. New evidence in support of the bankrupt's position was thus available for the first time, prior counsel for the bankrupt having failed to present the same. This evidence, if adduced, would have tended to exonerate the bankrupt from liability under the turnover order and would have explained away the shortage of merchandise, and unquestionably would have accounted for the cash in question.

The district court made its order directing that a hearing on the issues raised by all of the pleadings referred to be had before the referee. These affidavits and the order in question appear at folios 88 to 159.

When the bankrupt attempted to offer evidence by way of exoneration, the court below declined to receive the same and considered the turnover order as conclusive from the date of its entry, and directed that any explanation of the disposition of the property must commence with the date of such order.

Such direction by the court below made it impossible for the bankrupt to offer the evidence which he claimed was made available to him, and the refusal of the court below to accept such evidence over the objection of counsel, it is contended, was contrary to law and a denial of the bankrupt's constitutional rights.

The bankrupt contends that the order of the district court which directed a hearing as to his ability to comply with the turnover order granted him "a day in court" and was one of the due processes of law, the benefits of which he was fully entitled to receive. Furthermore, the bankrupt contends that it has not been shown by proof beyond a reasonable doubt that he has concealed or withheld property from his trustee, or that he is able to comply with the turnover order by the same measure of proof. The bankrupt, having thus been precluded from offering any evidence antedating the date of the turnover order, was in no position to offer any evidence by way of exoneration. The court below, therefore, adjudged the petitioner in contempt and directed his commitment.

The Circuit Court of Appeals for the Second Circuit affirmed the order of the district court (R., 140).

From an examination of the prevailing opinion of the circuit court of appeals, it is obvious that a controlling point in the determination of said appeal was the fact that no evidence was offered by the bankrupt to show what had been done with the property since the adjudication.

The order of the district court was affirmed, one circuit judge dissenting. The legal reasons for the affirmance were set forth in a case handed down simultane-

ously with the case at bar in a proceeding entitled "Oriel, Confino & Company," 22 Fed. (2d), —, in which proceeding similar propositions of law were involved. The court substantially held that the turnover proceedings, being civil in nature, proof beyond a reasonable doubt was not necessary. The same granted leave to your petitioner to present this petition for a writ of certiorari and granted a stay of proceedings pending the same.

A certified copy of the entire record in the case, including the appeal to the United States Circuit Court of Appeals for the Second Circuit, is submitted herewith as an exhibit to this petition.

The Statute Involved.

The statutes for the violation of which your petitioner contends he is entitled to relief from this Court, in so far as the same are material, are as follows:

Article IV of the Constitution of the United States of America, which provides:

> "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury • • • nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty or property without due process of law;*"

Section 11 of the National Bankruptcy Act, which provides that courts of bankruptcy shall have jurisdiction at law and in equity, Subdivision (7):

> "Cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided;"

and Subdivision (13):

> "Enforce obedience by bankrupts, officers, and other persons to all lawful orders, by fine or imprisonment or fine and imprisonment;"

Reasons for Granting the Writ.

Your petitioner respectfully submits that the writ should be granted for the following reasons:

(1) That the decision of the Circuit Court of Appeals for the Second Circuit herein is inconsistent and at variance with its own determinations.

In re Weber, 290 Fed., 404, in which case the court, in reviewing a turnover proceeding against the bankrupt, made the following observation, which was practically literally followed by the petitioner in the case at bar:

> "If he has been misadvised and finds himself for that reason in the position of being punished for not doing what it was impossible to do, presumably upon an application to purge himself of the contempt, he would be allowed to submit evidence to show facts exonerating him, which he has heretofore failed to do."

In the case at bar the referee declined to accept any testimony offered by your petitioner to explain his inability to comply with the turnover order, although the order of reference made by the district court di-

rected that all of the issues on all of the pleadings be heard. This order of the district court (Record, fols. 158 to 159) was never set aside, vacated or annulled, and the trustee took no appeal therefrom. This order, even though improvidently granted or irregularly obtained, should have been respected.

This theory was advanced by the circuit court of appeals in its opinion of affirmance *In re* Oriel, Confino & Company, 22 Fed. (2d), —, and reliance upon Cape May R. R. Co. *v.* Johnson, 35 N. J. Eq., 422, was placed as authority.

(2) The findings of the court below were based upon a mistaken theory followed by the accountants for the trustee and adopted by the court below, and a gross misconception of the facts, and the methods of the trustee in establishing his case before the referee has been condemned in at least one other instance by a district court having before it a similar proceeding. *In re* Magen, 18 Fed., 288, the court condemned cases built up by circumstantial evidence, particularly by expert accountants.

(3). The learned circuit court of appeals, in ruling that merely a preponderance of the evidence was necessary, is at great variance with that of the circuit courts in the following instances:

First Circuit: *In re* Annie M. Cole, 144 Fed., 392; *In re* Goodrich, 184 Fed. Rep., 5.

Second Circuit: *In re* D. Levy & Co., 142 Fed., 442.

Third Circuit: Subkinsky *v.* Bodek, 172 Fed., 340.

Fourth Circuit: Kirsner *v.* Taliaferro, 202 Fed. Rep., 51.

Fifth Circuit: Stuart *v.* Reynolds, 204 Fed., 709; Samuel *v.* Dodd, 142 Fed., 68.

Sixth Circuit: Johnson *v.* Goldstein, 11 Fed. (2d), 702.

Seventh Circuit: Freed *v.* Central Trust Co., 215 Fed., 873.

Eighth Circuit: Boyd *v.* Glucklich, 116 Fed. Rep., 131.

Frender & Alpine, Bankruptcy No. 38283, decided Aug. 31, 1927; Opinion by Knox, D. J., So. Dist. of N. Y. (unreported opinion).

In the interests of justice, your petitioner prays that this Court review the record and the proceedings of the court below, for the following reasons:

(1). To determine whether your petitioner has had the benefit of the constitutional safeguards with respect to the provision that your petitioner be not deprived of his liberty without due process of law;

(2). That there being grave uncertainty of your petitioner's ability to comply with the turnover order, that imprisonment of your petitioner for failure so to do is inconsistent with and contrary to established law;

(3). That the questions of law involved are of grave and substantial importance to the mercantile world and to bench and bar of this nation;

(4). That a definite declaration is necessary by this Court to set at rest the conflicting opinions of the various circuit courts of the country and the application of the law in this regard.

Dated February 21, 1928.

SAMUEL PRELA,
Petitioner.

ARCHIBALD PALMER, Esq.,
Attorney for Bankrupt.

State of New York,
City of New York,
County of New York, ss:

Samuel Prela, being duly sworn, deposes and says that he is the petitioner named herein; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

SAMUEL PRELA.

Sworn to before me this 21st day of February, 1928.

SAUL RUBIN,
Notary Public, Kings County.

Kings Co. Clerk's No. 291, Register's No. 8337. Certificate filed in New York County.

N. Y. Co. Clerk's No. 846, Register's No. 8566. Commission expires March 30, 1928.

APPENDIX TO PETITION.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.

In the Matter of SAMUEL PERLA, Trading as SELWELL BLOUSE COMPANY, Bankrupt-Appellant.

Before MANTON, L. HAND, and SWAN, circuit judges.

OPINION.

Appeal from the District Court for the Southern District of New York.

An order was entered punishing the bankrupt for contempt of court in having wilfully disobeyed an order directing him to deliver over to his trustee merchandise and money, and committing him to imprisonment for failure so to do. Order affirmed.

Archibald Palmer, Esq., attorney for bankrupt appellant.

Max L. Rosenstein, Esq., of counsel.

George Lion Cohen, Esq., attorney for trustee appellee.

MANTON, *Circuit Judge*:

The appellant was adjudicated a bankrupt and thereafter was directed to turn over to his trustees merchandise and pay over money. He failed to do so. A mo-

tion was made to punish him for contempt, which resulted in the order appealed from. The motion to direct the appellant to turn over the property in question was referred to the referee in bankruptcy, who took testimony in a protracted proceeding. The appellant had full opportunity to present all his evidence, but called no witnesses to support his present affidavit, which sets forth an excuse in opposition to the order appealed from. The referee's order directing him to turn over the property, dated November 9, 1926, was affirmed by the district judge. An application was made to this court for leave to appeal, which was denied. A reargument of the motion to turn over was applied for in the district court, and denied. Thereupon the trustee, upon affidavits, moved to punish for contempt. An answer was interposed and affidavits in opposition were filed. The matter was again referred to the referee in bankruptcy, who took testimony, but he held that the order in the turnover proceedings made out a *prima facie* case against the bankrupt, and that the burden was on the bankrupt to go forward with evidence tending to show that since the date of the turnover order he had disposed of the property then found to be in his possession or control and directed to be turned over to the trustee. No evidence was offered by the bankrupt to show what he had done with the property since he was adjudged a bankrupt. The district court affirmed the report of the referee and adjudged the bankrupt in contempt.

On this appeal it is argued that it was error below to refuse an opportunity to the appellant to explain (1) his inability to comply with the turnover order, and (2) that the appellee had failed to establish beyond a reasonable doubt the fact that the appellant was concealing moneys and properties of the bankrupt, and (3) that there is a failure of proof to sustain the claim

that the appellant is presently able to comply with the order to turn over the property.

These claims were advanced in the Matter of Oriel & Confino, decided this day, and for the reasons there stated and upon that authority, we hold that a motion to punish for contempt for failure to obey a turnover order is a civil proceeding. A disobedience of the order to turn over presents a *prima facie* case of contumacy for punishment. The burden rests upon the moving party to establish, not beyond a reasonable doubt, but by a fair preponderance of proof, such contumacy. Having been directed to turn over property, it is presumed that the offender continues in his wilful and deliberate conduct when he fails to obey the order. Applying the rule stated in that opinion, it follows that this order must be affirmed.

Order affirmed.

Judge Hand dissents.

Certificate of Counsel.

I, Archibald Palmer, of New York City, N. Y., an attorney regularly admitted to practice in the Supreme Court of the United States of America, and the attorney for the petitioner herein,

Do hereby certify that in my opinion the petition herein is well founded as to matters of fact and as to matters of law, and that the case identified thereby is such that the prayer of the petition should be granted by this Honorable Court.

Dated February 23, 1928.

ARCHIBALD PALMER,
Counsel to Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 837 91

SAMUEL PRELA, TRADING AS SELWELL BLOUSE COMPANY, PETITIONER,

against

LOUIS HUBSHMAN, TRUSTEE IN BANKRUPTCY OF SAMUEL PRELA, TRADING AS SELWELL BLOUSE COMPANY, RESPONDENT.

BRIEF ON BEHALF OF PETITIONER IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI.

The opinion of the court below is reported in Volume 22, Fed. (2d).

The date of the judgment of the circuit court of appeals sought to be reviewed by this Court is January 9, 1928 (R., 138).

A statement of the case is contained in the petition herein.

The summary of the argument is set forth in the subject index.

Point I.

The Order of the District Court, Which Granted to the Bankrupt an Opportunity to Present Evidence by Way of Exoneration, Was a Lawful Order of the Court, and a Denial of the Benefits Thereof, with Resultant Imprisonment of the Bankrupt, Constitutes a Violation of Article V of the Constitution of the United States.

The trustee presented his petition to have the bankrupt adjudged in contempt of court for failure to comply with the turnover order. In response thereto, the answer of the bankrupt, and the affidavits of his wife, Mollie Prela; Jacob Cohen, his cutter; Jacob Rosen, his salesman; Philip Goldfrank and Philip Diamond, customers of the bankrupt, raised the precise question as to whether the bankrupt ever concealed the property directed to be turned over, and if a hearing on the evidence available through the medium of the affiants established no such concealment, then the effect of the turnover order, of necessity, would have failed and been annulled.

This order of the district court contained no limitation as to the date from which the explanation was to have commenced.

The court below declined to receive evidence designed to show that there was no basis for the turnover order in the first instance, and that the findings of the

referee, based upon the theory of the accountants, was in fact the result of a misconception of the facts and a grossly mistaken theory. Although the order of the district court, which directed a hearing on all of the issues, was never vacated, set aside or annulled, yet the court below refused to permit evidence to be adduced in support of the issues raised by the bankrupt.

In re Oriel, Confino & Company, decided by the Circuit Court of Appeals for the Second Circuit, simultaneously with the decision by the same court in the case at bar, the court referred to the finality of effect of an order in the following language:

> "Even if it was improvidently granted or irregularly obtained, it must nevertheless be respected until it is annulled by the proper authority. Cape May R. R. Co. *v.* Johnson, 35 N. J. Eq., 422."

The order of the district court was not given the respect which it was entitled to receive, and the consequent denial of a hearing to the bankrupt under the terms of this order makes clearly apparent the inconsistency of the rulings of the Circuit Court of Appeals for the Second Circuit.

The bankrupt is in jeopardy of being imprisoned for failure to comply with the turnover order. He has consistently denied withholding any property from his trustee. Upon ascertaining that through lack of proper advice he stood in danger of imprisonment, he besought an opportunity to explain by way of exoneration precisely in accordance with the suggestions of the same court *In re* Weber (*supra*), and yet, when

evidence was thus offered, he was precluded from presenting the same to such an extent as to prove valueless. The situation thus appears to be that on the one hand an opportunity to explain is provided to the bankrupt, and on the other hand, when he seeks to avail himself of the opportunity, he is denied a hearing.

Judging the events in the light of the expressions of opinion of the circuit court, we respectfully contend that the constitutional guarantees afforded to the bankrupt by Article V of the Constitution of the United States were unlawfully denied him.

Point II.

The Greater Weight of Authority Holds that There is No Conclusive Estoppel Which Precludes a Further Explanation or Hearing Antedating the Turnover Order with Which Authority the Court Below is at Variance.

Upon an examination of the authorities, it appears that there are two distinct lines of decision upon this subject founded upon different and divergent theories and conceptions of the law.

Some courts have held in substance that an order made by a referee, supported by some evidence, adjudging the bankrupt to have in his possession and control certain property belonging to his estate, and requiring that he turn the same over to his trustee, creates a presumption of the ability of the bankrupt to comply with the order and casts upon him the burden of proving the contrary, and that such a presumption

becomes final and conclusive unless the bankrupt gives an adequate explanation. This theory is supported—

In re Frankel, 184 Fed., 539.
In re Stavrahn, 174 Fed., 330.
In re Marks, 176 Fed., 1018.
In re Richards, 183 Fed., 501.

The other line of cases, and which seem to be more consistent with the finer sense of justice and the true principles of adherence to constitutional rights, hold in substance that in proceedings against a bankrupt for contempt for failure to obey an order requiring him to turn over money or property to a trustee *that the court should make a new and independent investigation* and should consider all material evidence relating to what preceded, as well as what followed, the referee's report, and from such investigation and from such evidence determine whether or not the order of the referee was justified, whether or not the bankrupt's disobedience is wilful and contumacious, and whether or not the bankrupt has the present ability to comply therewith. These cases are:

In re Davison, 143 Fed., 673.
In re Goodrich, 183 Fed., 106.
In re Cole, 163 Fed., 180.
In re Samel v. Dodd, 142 Fed., 68.
In re Elias, 240 Fed., 448.
In re Haring, 193 Fed., 168.

In the case last cited the court, at page 171, observes that to adopt the latter view seems to be more consonant with reason.

"The tendency to impose the burden of proving his innocence upon one in fact charged with the commission of a crime is a dangerous departure from those fundamental principles and constitutional guarantees which have been regarded as necessary for the adequate protection and sure safeguarding of the rights and liberty of every individual. Congress has not conferred upon referees in bankruptcy the power to imprison the bankrupt for contempt in failing or refusing to obey their orders. The court alone is authorized to exercise the power of commitment. Smith *v.* Belford, 106 Fed., 658-661; 45 C. C. A., 526; *In re* Shulman, 177 Fed., 191-193; 101 C. C. A., 361. The power of this court to imprison for an indirect contempt such as the one here alleged is undoubted; but it is also too well settled to admit of controversy *that such power should be exercised with clear and convincing proof establishing the guilt of the accused. A discretionary act cannot be done by proxy. To hold that the investigation by this court of respondent's guilt or innocence must begin where that of the referee terminates is to deprive this court of the discretion vested in it by law and to confer upon the referee the power to do indirectly that which he cannot do directly.*"

and further, at page 172:

"Accounting proceedings before the referee are purely civil, while proceedings for contempt are criminal in both their nature and consequences."

In re Elias (*supra*), the court, in passing upon the right of a bankrupt to have his "day in court" and an opportunity to be heard in defense to a contempt proceeding for failure to obey a turnover order aptly states the proposition to be:

> "What may he say in his defense—that he did not have the property when the order was made by the referee, or that since that time he has become disabled to deliver it?"

The court approves of the language of Judge Sessions *In re* Haring (*supra*), and while it is held perhaps because of the particular facts in the case that only a preponderance of the evidence was necessary to be adduced in behalf of the trustee, yet the court concludes its opinion, at page 461, with the following language:

> "That in doing so he must, giving due weight to the finding of fact by the referee, examine for himself the evidence in regard to the conduct of the bankrupt and all other relevant evidence before and since the passing of the order by the referee."

Guided by these principles, the court *In re* Elias (*supra*) denied the order imprisoning the bankrupt for contempt.

Judging the facts and circumstances in the case at bar, we contend that when the bankrupt offered credible proof in support of his plea for exoneration from liability under the turnover order, that he was not estopped. A refusal of the court below to accept such

proof which antedated the turnover order was therefore against the greater weight of authority, contrary to what appears to be the accepted doctrine of the higher courts of this country which have passed upon this proposition.

Point III.

The Acts Charged to the Bankrupt Constitute Concealment, Punishable by Imprisonment, and the Degree of Proof Should be of that Beyond a Reasonable Doubt.

The court below, in holding otherwise, is at variance with that of the better authority, and error was thus committed.

In re D. Levy & Company, 142 Fed., 442; C. C. A. (2d), which is the same court which passed upon the record in the case at bar, the court passed upon the question of contempt and said:

> "We are not unmindful of the general rule that the power of imprisonment for contempt in such cases should be exercised with great caution and only *upon proof which establishes the facts beyond a reasonable doubt, which must in any case be clear and convincing.*"

In re Small Shoe Company, 16 Fed. (2d), 205, the court strongly suggested, and it is reasonable to infer from the opinion, that the measure of proof in contempt proceedings is that of proof beyond a reasonable doubt.

Similar expressions tending to show that the same court apparently required a greater degree of proof in contempt proceedings may be discerned from its opinion.

In re U. S. *ex rel.* Palais *v.* Moore, 294 Fed., 852.
In re Plaza Shoe Co., 15 Fed. (2d), 278.
In re Weber (*supra*).

In the Small case the court, by Hon. Learned Hand, C. J., while not laying down a definite rule of the proof required, said:

> "If the criminal rule applies, the trustee would then have to satisfy the court beyond a reasonable doubt that the respondent had possession of the property at the time when the summary order was entered."

This theory of law is supported by the following authorities:

First Circuit: *In re* Annie M. Cole, 144 Fed., 392; *In re* Goodrich, 184 Fed. Rep., 5.
Third Circuit: Subinsky *v.* Bodek, 172 Fed., 340; American Trust Co. *v.* Wallis, 126 Fed., 464.
Fourth Circuit: Kirsner *v.* Taliaferro, 202 Fed. Rep., 51.
Fourth Circuit: *In re* Elias, 240 Fed., 448.
Fifth Circuit: Stuart *v.* Reynolds, 204 Fed., 709; Samuel *v.* Dodd, 142 Fed., 68.
Sixth Circuit: Johnson *v.* Goldstein, 11 Fed. (2), 702; *In re* Haring, 193 Fed., 168.
Seventh Circuit: Freed *v.* Central Trust Co., 215 Fed., 873.
Eighth Circuit: Boyd *v.* Glucklich, 116 Fed. Rep., 131.

In re Elias (*supra*), it was suggested upon the argument that it was within the power of the court to punish by imprisonment for contempt. In the discussion of the question by the court, the following appears:

> "Whatever distinction may have been drawn by courts in balancing arguments advanced to sustain conflicting views as to whether a contempt proceeding is civil or criminal it is, when used as a means of punishment for all practical purposes, punitive, and when the act complained of is made by statute criminal, the person charged should be prosecuted 'by due process of law' by indictment and a trial before those tribunals, grand and petit juries, with all of the safeguards which are guaranteed to the citizen by the Constitution and laws when liberty is involved."

citing Stuart v. Reynolds, 204 Fed., 709, in which case the court, at page 717, said:

> "In cases like the present case, where the bankrupt is accused of withholding and refusing to surrender large stocks of goods, and he answers on oath denying possession and control of them, his control and possession being an affirmative allegation of the trustee, it is not at all unreasonable to look at his answer as sufficient to secure his discharge unless evidence of the most convincing kind is offered to sustain the charge against him. The affirmative in such case would not be difficult to prove if the charge were true. *In cases where it is charged that he*

> *withholds large sums of money and he makes sworn denial, it is not consistent with the admitted rule that his guilt to authorize commitment must be proved to the exclusion of reasonable doubt to say that the burden can be put on the condemnor to prove his negative averment.*
>
> "In such cases the rule undoubtedly goes to this extent, to quote the words of an author of authority: 'It requires something like incontestable evidence or evidence beyond a reasonable doubt to overcome the denial. 1 Remington on Bankruptcy, Section 1844."

In conclusion, the court, at page 726, says:

> "It is to the interest of the public that the courts should retain the power to punish for contempt. The district courts, like this court, are the creatures of Congress, and their power is within legislative control. Rapalje on Contempt, Section 11, *Ex parte* Robinson, 19 Wall., 505; 23 L. Ed., 205. The way to preserve it is not to abuse it."

Bearing in mind that the case against the bankrupt herein was based upon a theory that one and one-half yards of merchandise was required to the manufacture of blouses, which theory the bankrupt seriously contests; in the light of the bankrupt's contention that tunics and not blouses were the principal product of his factory, and that he has credible evidence to support his contention, we respectfully contend that there has been an utter lack of proof beyond a reasonable doubt to justify the bankrupt's imprisonment.

Point IV.

The Record Disclosing a Serious Doubt of the Bankrupt's Ability to Comply with the Turnover Order, the Commitment Order, as a Matter of Law, is Invalid.

The report of the referee (fols. 238-239) contains no statement of any fact as to the present ability of the bankrupt to comply with the turnover order. It held that the trustee's *prima facie* case was made out by the turnover order, and it assumed merely that the bankrupt was able to comply therewith. When the bankrupt attempted to rebut the presumption of present possession, as indicated by the record, such opportunity was denied him by the referee.

The generally accepted rule of law that commitment for contempt should be exercised with extreme caution and only when the court is satisfied that the bankrupt has the present ability to comply was completely disregarded.

In re Oriel, Confino & Company, 22 Fed. (2d) (*supra*), Hon. Learned Hand, C. J., in his dissenting opinion, used the following language:

> "To me it seems intolerable that a man should be coerced by an indefinite imprisonment to do what it is uncertain that he can do at all. I recognize into all human affairs some doubts must enter, but when the stake is liberty, we should make sure if we can. If my brothers are right, although the finding in the summary order may rest only upon probabilities, the bankrupt

> is precluded from attacking its validity and he is sent to jail and kept there for as long as the judge sees fit."

The trustee's case was predicated upon a theory advanced by the certified public accountants.

In re Magen (*supra*), the district court expressed itself:

> "* * * I am distrustful of cases that are built up purely by circumstantial evidence, particularly by expert accountants * * *."

In re American Trust Company *v.* Wallis, 126 Fed., 464, in speaking of the power to punish for contempt, the court said:

> "This power, however, is far reaching and drastic and must be exercised with cautious discretion. If the bankrupt denies that he has possession or control of the property or if a third person in possession thereof claims to hold it not as the agent or representative of the bankrupt, but by title adverse to him, and there is no evidence to indisputably show that such denial or claim is false or fraudulent and that the case is one of simply concealment or refusal on the part of the bankrupt or the one in possession to deliver up the property as ordered, *it would be an unwarranted stretch of power on the part of the court to resort to a summary proceeding for contempt for the enforcement of its order*"

and continuing further, the court states:

> "It is better to fall short of an absolutely perfect administration of the theory of the bankrupt law than to arm referee or court with pow-

ers of oppression alien to the spirit of our laws and institutions."

The proof in the case at bar is wholly circumstantial and rests upon a foundation of inference and presumption which may be very much at variance with the actual facts. At best, the case against this bankrupt is a doubtful one and it is deemed the paramount duty of courts to safeguard the rights and liberties of debtors who may be honest in spite of appearances against them and whom the law presumes to be innocent until their guilt is established.

There being an utter lack of clear and convincing proof required by the law to justify the bankrupt's commitment, the order of commitment should fall.

POINT V.

The Questions Presented are of Considerable Importance to the Mercantile Interests and the Bench and Bar of the Country, and a Definite Determination Will Set at Rest Conflicting Determinations of the Various Courts.

The writ of certiorari should be issued.

Respectfully submitted,

ARCHIBALD PALMER,
Counsel for Petitioner.

MAX L. ROSENSTEIN,
Of Counsel.

Office Supreme Court, U.S.
FILED
APR 9 1928
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. [redacted] 91

SAMUEL PRELA, trading as SELWELL BLOUSE COMPANY,

Petitioner,

vs.

LOUIS HUBSHMAN, Trustee in Bankruptcy of SAMUEL PRELA, trading as SELWELL BLOUSE COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

GEORGE LION COHEN,
Solicitor for Respondent,
285 Madison Avenue,
Borough of Manhattan,
City of New York.

(33,249)

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Supreme Court of the United States

OCTOBER TERM, 1927.

No. 837.

SAMUEL PELLA, trading as SEWELL BLOUSE COMPANY,
Petitioner,

AGAINST

LOUIS HUESHMAN, Trustee in Bankruptcy of SAMUEL PELLA, trading as SEWELL BLOUSE COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The Nature of This Bankruptcy.

The bankrupt's schedules filed herein show total liabilities amounting to $23,701.31. The actual net assets are less than $4,000 (though the schedules claim $10,876.49). On January 1st, 1924, the bankrupt's assets exceeded his liabilities by more than $12,000. In the eleven months preceding the filing of the petition between $25,000 and $31,000 disappeared (fol. 383).

The bankrupt conducted a small business, with low operating expenses; his business was well run; he kept

a set of books; retained the same employees for several years, and no reason for the large discrepancy between assets and liabilities appears, except the fraudulent concealment upon which the turnover order was entered (fol. 384).

The sum of $10,223, which the trustee was able to trace to the bankrupt, was undoubtedly part of a much larger sum concealed by the bankrupt. The turnover order was based upon the assumption that the bankrupt had no merchandise in his possession on September 1st, 1924, three months before the petition was filed. *If the amount of the merchandise in his possession on September 1st, 1924, had been added to the amount for which the bankrupt was held accountable, the amount found to have been concealed by the bankrupt would have been much greater* (fols. 384-5).

The Turnover Proceedings Resulting in the Order Finding Bankrupt in Contempt.

An involuntary petition was filed on November 22nd, 1924 (fols. 3, 312). Louis Hubshman was elected trustee on January 20th, 1925, (fols. 48, 374). On July 3rd, 1925, after a thorough investigation of the bankrupt's affairs, the trustee commenced a turnover proceeding against the bankrupt (fol. 375). Hearings were held before Hon. Peter B. Olney, Jr., Referee in Bankruptcy, and testimony of witnesses taken, during the months of July, September, October, November and December, 1925, and February and June, 1926, (fols. 375, 376). At these hearings the trustee called a number of witnesses and introduced documentary evidence, including the bankrupt's books. Some of the testimony against the bankrupt was extracted from the bankrupt himself, from William Klein, his brother-in-law, who was also one of bankrupt's employees.

Though these hearings continued for almost eleven months, and the bankrupt had ample opportunity to present all evidence, he did not call any of the witnesses referred to in his affidavits (fol. 377). *Nowhere in the record is there any valid reason why these witnesses were not called at the hearings upon the turnover motion* (fol. 5).

These hearings having been concluded, Referee Olney rendered a memorandum opinion on June 30th, 1926, (fols. 1-9), deciding against the bankrupt. Thereafter, on July 8th, 1926, the Referee made an order directing the bankrupt to turn over to the trustee goods, wares and merchandise and moneys in the sum of about $10,223, found to have been concealed by the bankrupt from his trustee (fols. 10-21).

On July 21st, 1926, the bankrupt filed a petition for review of the said order of the Referee (fol. 35). Thereafter the Referee certified the question to the United States District Court (fol. 35). The trustee moved to dismiss the petition for review, and to confirm the order of the Referee (fol. 36). Judge Winslow, before whom the motion was argued, on October 27th, 1926, decided the motion in favor of the trustee and dismissed the petition for review, and affirmed the order of the Referee (fols. 27, 72). An order was accordingly thereafter made on November 9th, 1926, confirming the report of the Referee, and directing the bankrupt to turn over to the trustee, within ten days, the goods, wares and merchandise and money found to have been concealed by him (fols. 22-30).

Thereafter the bankrupt applied to the Circuit Court of Appeals for leave to appeal to the Circuit Court of Appeals (fols. 39, 40, 75, 94). This motion was argued on December 6th, 1926, before that court, before Judges Hough, Mack and Learned Hand, and after argument, the Judges unanimously decided that the application

Winslow, and the *Small Shoe Company* case, *supra*, held that the turnover order made out a *prima facie* case, and that the burden was on the bankrupt to go forward with the evidence tending to show that since the date of the turnover order, July 8th, 1926, he had disposed of the property by that order found to be in his possession or control, and that, as a result, he was unable to comply with the order (fol. 248). On this theory, the Referee declined to receive, or struck out if received, all evidence designed to show that, as a matter of fact, the bankrupt was not in possession or control on July 8th, 1926, or prior thereto, of any of the property, of which, by order of July 8th, 1926, he was found to be in possession or control (fol. 248).

No evidence was produced or offered by the bankrupt to show what had been done with this property since July 8th, 1926 (fol. 248).

The Referee accordingly found that the trustee's *prima facie* case, made out by the turnover order, was entirely unanswered by the bankrupt, and he accordingly found that the bankrupt was still in possession or control of the property, and that he had failed to comply with the turnover order, and should be punished for contempt (fol. 249).

The Referee's report reviewing the facts, and stating his theory of the law, is to be found at folios 238 to 249.

In the course of the hearings before the Referee, counsel for the bankrupt contended that, under the terms of the order of Judge Winslow, testimony showing that the turnover order was erroneous (in spite of its affirmance as above set forth), was admissible. At the bankrupt's request, the Referee granted an adjournment so as to give the bankrupt an opportunity to take such steps with respect to such order as he desired (fols. 197-8, 199-204). *The bankrupt did not*

move to resettle the order, but moved for instructions to the Referee (fols. 226-30). The motion was argued before Judge Knox on July 30th, 1927, and was denied. Judge Knox, in his opinion, said:

> "I shall not instruct the Referee as requested by petitioner. When the Referee has passed finally upon the reference before him, the matter may be brought before this Court in regular order" (fol. 230).

An order denying the motion for instructions was entered on July 31st, 1927 (fols. 232-7).

Upon the report of the Referee (fols. 238-249), and upon all of the proceedings had herein, the trustee moved to confirm the Referee's report, and to punish the bankrupt for contempt (fols. 250-8). The motion came on for argument again before Judge Winslow on August 31st, 1927 (fol. 267), and Judge Winslow decided the motion in favor of the trustee, confirming the report of the Referee in every respect (fols. 259-79), and finding the bankrupt guilty of contempt (fol. 271).

Thereafter the bankrupt applied to the Circuit Court of Appeals (2nd) for leave to appeal (fols. 304-57). The trustee appeared in opposition to this application for leave to appeal, and filed an answer to the petition (fols. 358-90). The motion for leave to appeal was granted, and an order entered on October 10th, 1927 (fols. 391-4). The Circuit Court of Appeals affirmed the Court below (p. 140).

POINT I.

There is no merit to the petitioner's contention that the Referee erred, and that Judge Winslow himself erred, and that the Circuit Court of Appeals erred in interpreting Judge Winslow's order of reference dated July 8th, 1927, and that the refusal to follow the bankrupt's request to reopen the matter *de novo* upon the contempt hearing, constituted a violation of Article V of the Constitution.

As this claim by the bankrupt is so obviously without merit, it will be disposed of first.

When the motion to punish the bankrupt for contempt came up in the United States District Court, it was argued before Judge Winslow (fols. 259-278), who was already familiar with the matter. It was Judge Winslow who originally affirmed the Referee's report and the turnover order, and signed the order directing the bankrupt to turn over the property (fols. 22-31), and it was Judge Winslow to whom an application for a reargument was made, and who had denied the application (fol. 77).

Upon the argument on the return of the motion for contempt Judge Winslow made a memorandum opinion, in which he said:

> "The question as to the ability only of the bankrupt to comply with the summary order will be referred to Referee Olney. See *Re J. H. Small Shoe Co., ex parte Mary G. Potter, Trustee, etc.*" (fol. 283).

The form of the order of reference entered thereon was prepared by the attorney for the bankrupt (fol. 170), and read in part as follows:

> "Ordered that the issues raised by the aforementioned papers and pleadings as to the ability

> of the bankrupt to comply with the turnover order dated the 9th day of November, 1926, be, and the same hereby are referred to Hon. Peter B. Olney, Jr., as Referee, for hearing, testimony and report, and that such hearings proceed with all convenient speed" (fols. 333-4).

When the matter came on to be heard before the Referee, the Referee, relying on what he considered Judge Winslow's instructions in the matter, and on the principles laid down in the *Small Shoe Co.*, case, held that the only question before him was the bankrupt's ability to comply with the turnover order (fol. 246). Accordingly, he held that the turnover order of July 8th, 1926, made out a *prima facie* case that the property therein referred to was in the possession or under the control of the bankrupt on July 8th, 1926 (fol. 249), and that the burden was on the bankrupt to go forward with evidence tending to show that since the date of the Referee's turnover order, July 8th, 1926, he had disposed of the property by that order found to be in his possession and control and, as a result, was unable to comply with the order (fol. 248). On this theory the Referee declined to receive, or struck out if received, evidence designed to show that, as a matter of fact, the bankrupt was not in possession or control on July 8th, 1926, or prior thereto, of any of the property which, by the order of July 8th, 1926, he was found to be in possession or control (fol. 248).

Bankrupt's counsel contended that the issues before the Referee were enlarged by virtue of the order of Judge Winslow and that, under said order, the Referee should have permitted evidence tending to show that the bankrupt never had the property he was found to have concealed (fols. 167-294).

That this contention was entirely baseless, will be apparent from the following: *This order was entered*

by the attorney for the bankrupt (fol. 170). *No appeal from this order of reference was ever taken; nor was any motion made to resettle this order.* The order was made by Judge Winslow after he had rendered his opinion above quoted (fols. 149-158). This opinion clearly shows that the only question referred to the Referee was the ability of the bankrupt to comply with the turnover order, upon the authority of the *J. H. Small Shoe Co.* case. The Referee understood the order to mean just that, and in his report (fols. 246-7) clearly states that was his understanding. While the hearings were in progress, the bankrupt made a motion in the United States Court to instruct the Referee as to what testimony should be received under this order. Judge Knox, who heard the motion, refused to give any such instructions (fols. 232-6). When the Referee's report was filed it came up for confirmation again before Judge Winslow, who had the matter before him on three other occasions (fols. 22-31, 77, 149-158). When the matter was argued before Judge Winslow, the attorney for the bankrupt again urged that the Referee erred in refusing to admit testimony showing that the bankrupt did not have the property on July 8th, 1926, or prior thereto. It was Judge Winslow who made the order of reference of July 8th, 1926 (fols. 149-158), and he must certainly be presumed to have known what he intended by that order of reference, and how that order should be construed. Judge Winslow dismissed the contentions of the counsel for the bankrupt, granted the motion to confirm the Referee's report, and an order was entered confirming the order of the Referee in every respect (fols. 260-278), and directing that the bankrupt be punished for contempt.

The mere recital of these facts disposes of the claim that Judge Winslow must have had in contemplation, "the granting of an opportunity to the bankrupt to ex-

onerate himself if he could do so by competent and credible evidence," if by "competent and credible evidence" is meant an opportunity to show that the turnover order was improperly granted.

It is therefore very clear that Judge Winslow's order was correctly interpreted by the Referee and by Judge Winslow himself and by the Circuit Court of Appeals and that it did not enlarge the issues of the case, the only issue being, "What did the bankrupt do with the property since July 8th, 1926?"

No constitutional right was denied to the bankrupt.

POINT II.

The order affirmed by the Circuit Court of Appeals, directs that the bankrupt be punished for contempt for failure to comply with the turn over order, and is part of a civil proceeding. In reality, it is part of the turn over proceeding, which is civil.

In the courts below, the bankrupt intimated that this proceeding to punish him for contempt is a criminal proceeding, and claimed that he should not be punished because he alleged he was not shown beyond a reasonable doubt to have had possession of the property when the summary order was entered (fol. 299).

The trustee maintains that, while the record shows beyond a reasonable doubt that the bankrupt had in his possession or under his control the goods, wares and merchandise and moneys enumerated in the order, the turnover proceeding and the contempt proceeding arising by reason of the bankrupt's failure to comply with the turnover order, are civil proceedings, and need only be established by a fair preponderance of evidence.

There is no doubt but that a great deal of confusion is apparent in the decisions in some of the jurisdictions remote from busy commercial centers as to the nature of the turnover orders and the proceedings to punish for contempt.

That a proceeding to compel a bankrupt to turn over property is regarded as a civil proceeding, cannot be doubted.

> *Re Plaza Shoe Co.*, 15 Fed. 2d, 278, 280 (C. C. A., 2nd);
>
> *Free v. Shapiro*, 5 Fed. 2nd, 578, 580 (C. C. A. 4th).

The failure to comply with a turnover order is a civil and not a criminal contempt. Sir John Fox, "The History of Contempt of Court" (Oxford, 1927), page 1.

This Court in *Gompers v. Bucks Stove and Range Co.*, 221 U. S. 418, 442, expressly held that the contempt arising out of a bankrupt's failure to comply with a turnover order, constitutes a civil rather than a criminal contempt.

To the same effect is *Michaelson v. U. S.*, 266 U. S. 42

POINT III.

The turnover order entered July 8th, 1926, affirmed November 9th, 1926, was a conclusive estoppel against the bankrupt upon the date of its entry upon the question of the bankrupt's possession of the property on that date. It could not be attacked upon the motion to punish the bankrupt for contempt.

In the *Matter of Frankel*, 184 Fed. 539, the then District Judge Learned Hand, while expressing serious doubt upon the merits of the particular summary order before him, nevertheless held that it was conclusive upon the question of the respondent's ability to comply with its terms at the time of its entry. In the course of his opinion, at page 541, he said:

> "It has undoubtedly been the practice in this district to treat such orders as conclusive estoppels upon the date of their entry, and to leave open to the respondent only the issue of showing what he has done with the money since that time."

It is respectfully submitted that the decision of Judge Learned Hand in the *Frankel* case, *supra*, is more logical than his subsequent dissenting opinion in *Re Oriel*, 23 Fed., 2nd, 409, 412.

Discussing the *Frankel* case, *supra*, Judge Thacher, in a very able and scholarly opinion, in *Re Oriel*, 17 Fed. 2d. 800, at page 801, says:

> "I am impressed with the soundness of the decision in the *Frankel* case, because it seems to be in accord with the practice of Courts of Equity in cases of civil contempt, to enforce by coercive means, through the process of attach-

ment, compliance with the affirmative commands of their decrees. The merits of the case in which an injunction is duly issued by a Court of general jurisdiction is never open to inquiry in such proceeding *Howat v. Kansas*, 258 U. S. 181, 42 S. Ct. 277, 66 L. ed. 559; *Hutto Sash, etc., Co. v. Fuelle* (C. C.), 143 F. 363; *U. S. v. Debs* (C. C.), 64 F. 724; *People v. Van Buren*, 136 N. Y. 352, 32 N. E. 775, 20 L. R. A. 446; *People v. Spalding*, 2 Paige (N. Y.) 326; *Hamlin v. N. Y., etc., Ry. Co.*, 170 Mass. 548, 49 N. E. 922; *Russell v. East Anglian R. Co.*, 2 Macn. & G. 104; *Woodward v. Lincoln*, 3 Swanst. 626."

In *Re J. H. Small Shoe Co.*, 16 Fed. 2d. 205; the Circuit Court of Appeals (2nd Circuit), at page 206, said:

> "We held in *Re Starcuba*, 174 Fed. 330, 98 C. C. A. 202, 20 Ann. Cas. 888, that upon contempt proceedings the summary order to surrender or pay made out a *prima facie* case. In *Re Weber*, 200 Fed. 404, 118 C. C. A. 556, we not only repeated this, but went further. We said that the respondent did not answer the *prima facie* case so made out by a bare denial that he could then comply with the order. At best, he has only two courses open to him. First, he may accept the order as correct when made, in which case he must show that he has since its entry, disposed of the money then found to be in his hands or within his control. Whether the trustee has the burden of proof we need not now say, but the duty of going forward is upon the respondent, and he can fulfill it only by accounting circumstantially for his disposition of the property."

To the same effect are:

> *Re Shulman v. U. S.* (C. C. A. 6th), 18 Fed. 2d, 579-580.

Reardon v. Pensoneau, 18 Fed. 2d 244, 246 (C. C. A., 8th).

U. S. ex rel. Pabsas v. Moore, 294 Fed. 852, 857, (C. C. A., 2nd).

In Re Starrakis, 174 Fed. 330, 332 (C. C. A., 2nd).

POINT IV.

The rule laid down by the bankruptcy courts that, upon a motion to punish a bankrupt for contempt for failure to comply with a turnover order, the bankrupt will not be permitted to urge as a defense that the Court making the order erred in its judgment, is supported by the highest authority.

In the *Oriel* case, *supra*, Judge Thacher, at page 802, says:

> "In this state, where the surrogates are given power by statute to enforce their orders by contempt proceedings, it is held in the Court of Appeals that, when process of contempt is employed to enforce compliance by an executor with a decree of distribution directing the payment of money, the investigation is limited to the service of the decree upon him and the facts of neglect constituting his violation of the decree. *Matter of Snyder*, 103 N. Y. 178, 8 N. E. 479. In all such cases the purpose of the proceeding is to coerce compliance with an order or decree entered after full hearing and careful determination, adjudicating rights existing between the parties to the litigation. Once those rights are determined by a Court having jurisdiction, there can in equity be no withholding of the process of the Court employed for their enforcement; and

in answer to the process of attachment the respondent is never permitted to question upon the merits the order or decree which he has disobeyed. The commitment in such cases has been aptly said not to be distinguishable in substance from a *capias ad satisfaciendum*, founded on a judgment at law. *Adams* v. *Adams*, 80 N. J. Eq. 182, 83 A. 190, Ann. Cas. 1913 E. 1083, Chase's Blackstone, 853.

"Surely it cannot be said to be sufficient answer to such a writ to question the judgment at law or decree in equity as not supported by evidence excluding all reasonable doubt upon the issues upon the determination of which adjudication was had. The doctrine that an injunction duly issuing out of a court of general jurisdiction, with equity powers, upon pleadings properly invoking its action, and served upon persons made parties thereto and within the jurisdiction, must be obeyed, and cannot be questioned in contempt proceedings, has been carried so far that the Supreme Court of the United States has said that, even if the Court issuing the injunction erred in assuming the validity of a void law going to the merits of the case, the invalidity of the law will not be examined in proceedings to punish criminally the violation of the injunction. *Howat* v. *Kansas*, 258 U. S. 181, 42 S. Ct. 277, 66 L. ed. 550.

"It is to be noted that this was said of a case of criminal contempt, in which the defendants were sentenced to imprisonment *for* one year. Nothing could more emphatically show the conclusiveness of an order or decree in proceedings to punish its violation or to coerce its performance. And the case is authority for the application of the rule, not only in civil contempt, but in criminal contempt as well. For these reasons, and for the reasons well stated by Judge Hand in his opinion in the *Frankel* case, I believe that case should be regarded as authoritative until overruled by superior authority."

Judge Thacher's views quoted above, are supported by the highest authorities in jurisdictions entitled to respect, as will appear from an examination of the following cases:

(a) *Federal Courts:*

The leading authority in the Federal Courts is undoubtedly *Howat v. Kansas*, 258 U. S. 181, cited in *Re Oriel, supra*, where this Court, at page 189, said:

> "An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings, properly invoking its action and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the Court may be, even if the error be in the assumption of the validity of a seeming but void law, going to the merits of the case."

To the same effect are:

Brougham v. Oceanic, 205 Fed. 857.
U. S. v. Alger, 62 Fed. 824.
Blake v. Nesbett, 144 Fed. 279.
Re Braun Co., 259 Fed. 309.
Michaelson v. U. S., 266 U. S. 42.

(b) *New York cases:*

The principal New York cases, in addition to *In re Snyder*, referred to by Judge Thacher, sustaining these views are the following:

People ex rel. Davis v. Sturtevant, 9 N. Y. 263.
People ex rel. Day v. Bergen, 53 N. Y. 404.
Daly v. Amberg, 126 N. Y. 490, 494.
Ketchum v. Edwards, 153 N. Y. 534, 538.
Stoltz v. Tuska, 82 App. Div. 81.

Brown v. *Brownstein*, 84 App. Div. 499.
Matter of Woodruff v. *Van Ness*, 17 App. Div. 581.
Matter of Huntsville, 19 App. Div. 381.
Lawson v. *Tyler*, 98 App. Div. 10.
Elder v. *Taylor*, 211 App. Div. 682.

(c) *New Jersey*:

Cape May R. R. Co. v. *Johnson*, 35 N. J. Equity, 422. In this case, the defendant was sought to be punished for violating an injunction. He endeavored to attack the order on its merits. The Court silenced him by adhering to the long established rule. At page 423, it is said:

> "The regularity, validity, or correctness of the order contemned cannot be examined on this proceeding. Even if it was improvidently granted or irregularity obtained, it must nevertheless be respected until it is annulled by the proper authority."

Una v. *Dodd*, 39 N. J. Equity, 173 (reversed on other grounds in 40 N. J. Equity, 670)

(d) *Missouri*:

State ex rel. Carroll v. *Campbell*, 25 Mo. App. Reports 635-639.

(e) *Massachusetts*:

Irvine & Casson v. *Hamlett*, 229 Mass. 500.

(f) *Illinois*:

Vulcan Detinning v. *St. Clair*, 315 Ill. 40.

(g) *Iowa*:

Burtch v. *Zeuch*, 202 N. W. 542.

(h) *Michigan*:

Saginaw Lumber & Salt Co. v. *Griffore*, 145 Mich. 287; 108 N. W. 681.

(i) *Vermont*:

Vilas & Platt v. *Burton*, 27 Vt. 56.

(j) *Wisconsin*:

Cline v. *Whitaker*, 144 Wisc. 439.

(k) *Washington*:

State ex rel Ewing v. *Morris*, 120 Wash. 146; 207 Pac. 18.

(l) *Oklahoma*:

Martindale v. *State*, 180 Pac. 385.

(m) *Oregon*:

State v. *LaFollette*, 100 Ore. 1; 196 Pac. 412.
State ex rel v. *Downing*, 40 Ore. 309-21.

(n) *Pennsylvania*:

Re Passmore Williamson, 26 Pa. State 9.
Hoskins v. *Somerset Coal*, 219 Pa. State 373.

These authorities show that the principle is firmly rooted that an order of a Court having jurisdiction must be implicitly obeyed, however erroneous it may be, and that it is no answer for one called upon to answer for disobedience, that the order was broader than the facts warranted, or that the Court, upon the facts, was unjustified in making the order. Litigants are not permitted, under the plea of hardship or injustice, real

or pretended, to nullify at will orders or decrees, however improvidently made, even if it may seem certain that the original Court acted in granting them, under a misapprehension or under some mistake.

Unless, therefore, it can be said that the bankrupt is the special ward of chancery, there would appear no valid reason for a rule that his failure to comply with a lawful order of the Court is not punishable unless the trustee can, after the lapse of years, once again prove a case against him "beyond a reasonable doubt." This favor is not shown to any other litigant in the courts. It is hard to find a justification for the exception in favor of a bankrupt who is either disinclined or disadvised to comply with a turnover order.

POINT V.

In this proceeding to punish the bankrupt for the civil contempt of failing to comply with the turnover order, it is not necessary to prove the concealment or the failure to turn over the property, beyond a reasonable doubt.

As has already been demonstrated, the highest authorities stand for the principle that upon a motion to punish for contempt, the defendant is never permitted to urge as a defense that the original mandate or order was improperly granted, upon insufficient proof, or otherwise. Upon further careful examination it will be found that the cases which hold that the violation of the order must be proved beyond a reasonable doubt have no application to the facts of the case at bar. These cases were practically all decided before the decision in *Gompers* v. *Buck's Stove Co.*, *supra*, and proceed upon the erroneous theory that the contempt

proceeding is criminal. Where the Courts have recognized the true nature of the contempt, no such confusion has resulted.

It has been seen that these contempt proceedings are civil.

Gompers v. Buck's Stove Co., supra.

In *Hilton v. Hilton*, 106 Atl. 139, the Court of Chancery of New Jersey refused to entertain a plea on the part of a defendant that, in the determination of a matter involving the punishment for contempt, the rule of criminal law must be applied, and the defendant must be proven guilty beyond a reasonable doubt. The Court held no such proof is necessary in the case of a civil contempt.

In the case of *Hake v. The People*, 230 Ill. 174, the Court had under review an order finding the defendants guilty of contempt of court. The Court found that the case involved a civil contempt, and said, at page 193:

> "* * * the case is, from its inception to its conclusion, in all its procedure, essentially a civil chancery proceeding, conforming itself, in its pleadings, character and quantity of proof required, and in its course through the appellate tribunals, to the rules and practice applicable to other chancery proceedings."

The Court held that in such a proceeding, it was not necessary to establish the case by proof beyond a reasonable doubt.

In *Flannery v. The People*, 225 Ill. 62, the Court found the contempt to be civil. At page 71 the Court said:

> "We are of the opinion that the rules of evidence applicable to civil cases should be followed

> in this case, and that the proof of the defendant's guilt beyond a reasonable doubt was not necessary."

To the same effect is the case of *McBride* v. *The People*, 225 Ill. 315.

The following cases hold that in a case of civil contempt, it is not necessary to prove the defendant guilty beyond a reasonable doubt:

> *Cutting* v. *Van Fleet* (C. C. A. 9th), 252 Fed. 100.
>
> *People* v. *Kowalsky*, 307 Ill. 378.
>
> *Re McCormick*, 132 A. D. 921, aff'd 196 N. Y. 571, opinion in 117 N. Y. Supp. 70.
>
> *Braketteal* v. *Adams*, 98 Georgia 722.
>
> *West Disinfecting Co.* v. *Koppelman*, 216 Ill. App. 438.
>
> *North Dakota* v. *Harris*, 14 North Dakota 501.
>
> *Morgan* v. *National Bank of Commerce*, 90 Oklahoma 280.

The issues in contempt cases are properly the following:

> "Was a valid order made, and has the defendant violated it?"

In this case the making of the order is not disputed. The bankrupt admits that he did not comply with it. The trustee has proved his case.

POINT VI.

Unless the bankrupt is punished for contempt upon his failure to comply with the turnover order, turnover orders would be useless.

Some of the Courts which have intimated that turnover orders in and of themselves are not sufficient evidence upon which to base a punishment for contempt, have suggested that the turnover orders, nevertheless, serve a useful purpose inasmuch as failure to comply with their terms would mean the barring of a discharge.

However, turn over orders are entered against persons who are not bankrupts, and who therefore are not concerned about obtaining their discharge. This is true of officers of bankrupt corporations and third parties. As against such persons, the turn over orders would be useless unless enforceable by punishment for contempt for failure to comply with them.

Nor can it be said that the entry of turnover orders creates a debt, because it has been expressly held by this Court in *Mueller* v. *Nugent*, 184 U. S. 1, that an order to turn over money is not an order for the payment of a debt, but an order for the surrender of assets of the bankrupt, placed *in custodia legis* by the adjudication. To the same effect:

> *In re Schlesinger*, 102 Fed. 117 (C. C. A. 2nd).

Obviously, unless the Courts treat turnover orders as conclusive estoppels against the parties as of the date of entry, turn over orders will become innocuous—

"solemn fatuities," as Judge Learned Hand has so well said in *J. H. Small, supra*. If the Courts are not prepared to declare these turnover orders useless, they must give full force and effect to their meaning, and render failure to comply with these orders dangerous and uninviting.

POINT VII.

The petition for a writ of certiorari should be denied. To reopen this matter at this time might give the bankrupt an opportunity to retain the money and property concealed by him, and would probably enable the bankrupt to escape the just consequences of his own misdoing. It would be unfair to creditors, and encourage the perpetration of fraud in bankruptcies.

For more than three years now, the bankrupt has been laughing at the trustee and his creditors. The arm of the court of equity has failed to reach him.

The petition was filed in November, 1924. There was a shortage of between $25,000 and $31,000 in the bankrupt's assets (fol. 383). Turnover proceedings were instituted; hearings before the Referee continued for eleven months; the Referee found for the trustee; the District Court affirmed the Referee's finding; the Circuit Court refused to allow an appeal; and the District Court again declared that there was no reason for a reargument, and that there must be some finality to these proceedings (fol. 363). The bankrupt failed to turn over the property. A motion was made to punish the bankrupt for contempt. Hearings were again held, the Referee recommended punishment, the District and Circuit Courts affirmed, yet the bankrupt is still at

liberty, sprinkling crocodile tears all over his pleadings, but all the time laughing at his creditors, and presumably, not taking the Courts seriously either. Though the trustee has been victorious upon every material point in every one of the numerous appearances in court, thus far the victories are only on paper. Defeated at every turn before Referees, before District Judges, and the Circuit Court of Appeals for more than three years, the bankrupt is still at large, still concealing the creditors' assets, and this Court is asked to postpone final judgment still further.

For more than three years this bankrupt has been able to postpone the day when he should turn over his property to his trustee in bankruptcy, and he has not as yet exhausted all of his opportunities for further delay.

And now the bankrupt asks this Court to declare in fact that he did not have a fair hearing, that we must reopen the turnover order, re-examine the charge of concealment, forget about the fact that the matter had been adjudicated. At this time the trustee's witnesses may have disappeared, records may have become vague, memories of men may have become faded. Shall the bankrupt profit by the very delays he has brought about, and which it is in his power, seemingly, to continue?

The honest merchants who extend credit are thus penalized, and the bankrupt who fraudulently conceals the property belonging to his creditors, can never, seemingly, be brought to respect the mandates of the Court. In the efforts to nullify the effect of turnover orders, the last few teeth of the bankruptcy law are sought to be prematurely extracted.

It is respectfully suggested that it is these delays on the civil, as well as the criminal, side of our courts, caused by the unexplained resourcefulnes of bankrupts

who plead poverty, that so unjustly tend to make our courts subjects of unfair criticism. It is just such possibilities of delay and the probabilities of ultimate futility of efforts to enforce the provisions of the bankruptcy law that encourage the multiplication of fraudulent bankruptcies, and the theft of thousands of dollars annually.

Respectfully submitted,

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Office Supreme Court, U.S.
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OCTOBER TERM, 1928.

No. 91.

SAMUEL PRELA, trading as Selwell Blouse Company,
Petitioner,

vs.

LOUIS HUBSHMAN, Trustee in Bankruptcy of Samuel Prela, trading as Selwell Blouse Company,
Respondent.

REPLY BRIEF ON BEHALF OF SAMUEL PRELA, PETITIONER.

ARCHIBALD PALMER,
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Supreme Court of the United States.

OCTOBER TERM, 1928.

No. 91.

SAMUEL PRELA, trading as Selwell Blouse Company,
Petitioner,

—against—

LOUIS HUBSHMAN, Trustee in Bankruptcy of Samuel Prela, Trading as Selwell Blouse Company,
Respondent.

REPLY BRIEF ON BEHALF OF SAMUEL PRELA, PETITIONER.

Respondent's brief is obviously not confined to issues involved in these proceedings. The questions raised herein are based on the refusal of the District Court to afford an opportunity to the petitioner to explain

1. His inability to comply with the turnover order.

2. That the respondent has failed to establish beyond a reasonable doubt the fact that the petitioner was concealing moneys and property of the bankrupt estate, and therefore should not be punished for contempt.

3. That there is a failure of proof to sustain the claim that the petitioner is presumably able to comply with the order to turn over the property.

A.

It will be noted that the cases cited in support of the second point of the respondent's brief, page 9, do not state the rule sought to be propounded by the respondent under this point, to wit: that the findings of the Referee affirmed by the District Court are conclusive on the reviewing Court.

On the contrary, the courts there say, that the reviewing Court should use care in disturbing the findings of the Referee unless there is evidence of a mistake and a miscarriage of justice.

One of petitioner's contentions is that the Referee erred in not permitting him to present all of his admissible evidence, and that, therefore, the Referee has insufficient facts before him to make a conclusive finding.

B.

The respondent's third point, raising the question of the degree of proof required in a turnover proceeding, is irrelevant and not in issue.

No part of the petitioner's case questions the degree of proof required in the original turnover motion. The issues raised by the petitioner are confined to the question of the degree of proof necessary in contempt proceedings.

Free v. *Shapiro*, 5 Fed. (2nd) 578 (C. C. A., 4th Cir.), cited by the respondent, approves the rule adopted by the Fourth Circuit and upon which petitioner bases his contention—at page 579 the Court says:

> "By the weight of authority, in attachment for contempt for failure to turn over assets adjudged

> to be withheld, the Court will not imprison the bankrupt unless satisfied beyond reasonable doubt of his guilt. The cases are cited in 7 Remington on Bankruptcy (3rd Ed.) 3041. So this Court held in *Kirsner* v. *Taliaferro*, 202 F. 51, 120 C. C. A. 305. This is but the application to contempt which results in imprisonment of that tender consideration for the liberty of the citizen expressed in the doctrine that a charge of crime must be proved beyond reasonable doubt."

And at page 580:

> "If the inquiry leads to the conclusion that he did have assets which were not turned over to the trustee, the order follows, requiring him to turn them over, and it is a final adjudication that he did improperly retain assets. But this is not inconsistent with the view that, in contempt proceedings, where the issue of imprisonment is involved, the Court may refuse to imprison because the evidence of present ability to pay is not convincing beyond a reasonable doubt."

C.

The cases cited in support of the fourth point of the respondent's brief, page 14, involve only whether the failure to comply with a turnover order constitutes a civil or criminal contempt.

These proceedings to punish for contempt have been held by many courts to be quasi criminal in their nature.

In re Cashman (D. C. N. Y.), 168 Fed. 1008, the Court said:

> "Proceedings for contempt being criminal in their nature, it is, of course, necessary for those alleging contempt to prove the commission thereof beyond a reasonable doubt."

To the same effect:

> *In re Switzer* (D. C. So. Car.), 140 Fed. 976;
> *Moody* v. *Cole (In re Annie Cole)* (D. C. N. Y.), 148 Fed. 295;
> *Skubinsky et al.* v. *Bodek*, 172 Fed. 340 (C. C. A. 3rd Cir.);
> *Stewart* v. *Reynolds*, 204 Fed. 709 (C. C. A., 5th Cir.).

The rule requiring proof beyond a reasonable doubt has been based upon other appropriate grounds. These are the seriousness of the consequences, and futility and injustice of depriving the individual of his liberty for failing to do the impossible and the inevitable loss of dignity that would result if the Court were compelled to retreat after it realized that imprisonment failed to enforce obedience.

These are the reasons which Judge Rose gave in *Kirsner* v. *Taliaferro* (cited in petitioner's brief, p. 8) (C. C. A.), 202 Fed. 51, for his statement that the conviction that the bankrupt had the power to comply "should be as nearly absolute as human conclusions ordinarily can be".

To the same effect:

> *In re Oriel*, 23 Fed. (2nd) 409, dissenting opinion of Judge Learned Hand.

In *Walnut Creek Milling Co. et al.* v. *Grain Products Co.* (D. C. La.), 21 Fed. (2nd) 381, the Court said:

> "I am persuaded that the weight of authority supports the view that the report of the Referee, who heard the witnesses, should be given great weight, when his findings of fact are being considered; that, since the bankrupt holds his property in trust to preserve it and turns it over to his trustee, it should be presumed that he will do so, if such property or assets are in his possession or control, upon an order to that effect being made; that the decision or adjudication that he did retain assets is final when made, but is not conclusive against him in any contempt proceeding looking to his imprisonment, if any should follow; that such an adjudication or decision that he did retain assets may be established by a preponderance of evidence; whereas proof beyond reasonable doubt would be required to sustain a criminal charge of concealment of assets or a proceeding for contempt of a quasi criminal character."

D

In reply to the respondent's fifth point, that the trustee had established a *prima facie* case by showing that a turnover order had been entered and the failure of the bankrupt to comply therewith, petitioner contends that upon an application to purge himself of contempt for his failure to comply with the turnover order he should have been allowed to submit evidence to show facts exonerating him which he had heretofore failed to do.

> *In re Weber*, 200 Fed. 404 (cited on p. 6 of petitioner's brief).

E.

The sixth point of the respondent (p. 21), that the turnover order was a conclusive estoppel against the bankrupt upon the date of its entry on the question of the bankrupt's possession of the property and money.

In the dissenting opinion in *Re Oriel* (*supra*), Learned Hand, *J.*, says:

> "Except for *Drakeford* v. *Adams*, 98 Ga. 722, 25 S. E. 833; *Reardon* v. *Pensoneau*, 18 F. (2nd) 244 (C. C. A. 8), and my own early decision, *In re Frankel* (D. C.) 184 F. 539, all the cases I can find so holding did not involve the ability of the contemnor to comply. That appears to me a crucial distinction, and it was so held in *Johnson* v. *Goldstein*, 11 F. (2nd) 702 (C. C. A. 6), though I am not clear that the case is strictly one of *res judicata*. In any event, we must not miss the forest for the trees; when exceptions are necessary, exceptions there should be."

Johnson et al. v. *Goldstein*, 11 Fed. (2nd) 702 (C. C. A. 6) (cited *supra*), presented a situation similar to the case at bar. Upon a petition of the trustee in bankruptcy, the Referee made an order directing the bankrupt to turn over the merchandise and or money to the extent of $10,591. Upon the bankrupt's petition to review, the District Judge modified the Referee's order, and on May 29, 1924, entered a similar order but fixed the amount at $8,000. On June 3, 1924, the trustee filed a petition to punish the bankrupt for contempt for not having complied with the turnover order of the District Judge. On June 9, 1924, the bankrupt filed his response, averring that he had no money or property to

pay the $8,000 or any part thereof, that no one held any money or property for his use or benefit, and that he had no means of obtaining such money or property. A petition was filed to revise the District Court's turnover order of May 29, 1924, and this was affirmed by the Circuit Court. On February 21, 1925, the trustee made a motion to imprison the bankrupt until he should purge himself of the contempt or turn over the $8,000. Pursuant thereto, the original petition of June 3, 1924, the response of June 9, 1924, and the last motion came on before the District Court, and on March 9, 1925, the response of the bankrupt was adjudged sufficient, the motion to commit overruled and the rule discharged.

A petition was then made by the trustee to revise the order of the District Court overruling the motion to imprison the bankrupt for contempt and discharging the rule to show cause. This petition was denied. Mack, *C. J.*, says, at page 703:

> "(2) The question presented on the former petition to revise, unlike that which an appeal in equity presents, was solely whether or not there was any substantial evidence to sustain the original turnover order, not whether the weight of evidence justified it. We held that there was sufficient evidence; we did not hold, as that question was not, and in that proceeding could not have been presented, that the evidence would not have justified a contrary finding by the Referee and District Judge. Our decision is binding, therefore, only as to the question presented. It follows that if, but for the proceedings in this Court, the District Court could have set aside its turnover order, or in the contempt proceedings have disregarded the findings on which the order

was based, its power so to do remained unaffected by the petition to revise and our affirmance thereon.

(3) The apparently contradictory findings can be explained on an interpretation that Judge Dawson disagreed with the Referee and Judge Moorman. While the latter made no express findings of fact, in reducing the amount directed by the Referee to be turned over, he necessarily differed with the Referee's findings, and that, too, although he heard no additional testimony. We shall assume, however, that he found the bankrupt then to have the $8,000 in his possession or control. The turnover order, together with the findings on which it was based, was in no sense final; it was but an interlocutory step in the administration of the estate, and as such within the discretionary power of the Court to rehear, reconsider, and change at any time while the bankruptcy proceedings were pending. In substance, though not in form, Judge Dawson granted such a rehearing, and on the same evidence, supplemented by other evidence, reached a conclusion contrary to that of Judge Moorman as to the bankrupt's ability to pay over $8,000, or any part thereof.

(5) What this additional evidence was is not apparent from the record; we must therefore assume that, with the earlier testimony, it supported the second finding, for clearly, if a rehearing was proper, additional testimony could be taken thereon. But, even without it, we could not hold that there was no substantial evidence before the Referee to sustain this new finding.

The petition to revise must therefore be denied."

F.

The seventh point of respondent's brief, page 24, is not confined to the issue involved.

The turnover order is not involved in this appeal. The petitioner contends that the turnover proceedings and the contempt proceedings are separate and distinct. In the turnover proceedings the inquiry is whether the bankrupt has failed to turn over to the receiver or trustee properties and moneys belonging to the estate; and that in the contempt proceedings where the issue of imprisonment is involved, the inquiry is whether the bankrupt has failed to comply with the turnover order, whether he has the present ability to do so, and the degree of proof necessary in contempt proceedings—and that the two proceedings are not consistent and that different degrees of proof are involved.

Free v. *Shapiro, supra;*
In re Walt, 17 Fed. (2nd) 588;
Cases cited in petitioner's brief.

G.

In the third point of petitioner's brief, page 8, and cases cited thereunder, the contentions of counsel in respondent's eighth point, page 35, are answered. Additional authorities in support of petitioner's contention on this point are:

First Circuit— *In re Cole*, 148 Fed. 295;
Third Circuit— *In re Nicrason*, 182 Fed. 912;
Fourth Circuit— *In re Switzer*, 140 Fed. 977;
Free v. *Shapiro*, 5 Fed. (2nd), 578, C. C. A.;

Fifth Circuit—	*In re Schaefer*, 119 Fed. 1010; *Walnut Creek Milling Co.* v. *Grain Products Co.* (D. C. La.), 21 Fed. (2nd) 380; *In re Mize*, 172 Fed. 946; *In re Goldfarb*, 131 Fed. 643;
Sixth Circuit—	*In re Adler*, 129 Fed. 502;
Seventh Circuit—	*In re Gerstel*, 123 Fed. 166;
Ninth Circuit—	*In re Gottardi*, 114 Fed. 328; *Power* v. *Furman* (C. C. A.), 220 Fed. 787.

II.

In reply to the ninth point of the respondent's brief, page 37, that this is not a case which the Court might examine *de novo*, the petitioner contends that when the motion was made to punish him for contempt, he made application to adduce additional evidence to exonerate his position in compliance with the rule in *In re Weber*, *supra*.

I.

Respondent's tenth point, page 41, is:

> "Whatever the rule may be, the turnover order in this case must be presumed to have been based upon a finding that the proof of concealment and failure to turn over the property and money was beyond a reasonable doubt."

Neither the discussion under this point nor the cases cited thereunder, have any bearing on this contention.

The trustee's case was based almost entirely upon the report of an accountant (R. 22) and upon this the

Referee based his findings that the petitioner should turn over to the estate property and moneys. It is upon these findings that the respondent now seeks to have the petitioner adjudged in contempt without allowing him the opportunity to introduce evidence explaining his inability to comply.

In re Jaffee, 14 Fed. (2d) 558, the Court in discussing cases made up from accountants' testimony, said:

> "It is sometimes said that the mathematical computations can apparently prove almost anything; but conclusions, based largely upon the opinions and deductions of expert accountants are highly speculative and of doubtful value in absence of evidence of probative force."

To the same effect:

In re Magen, 18 Fed. (2d), 288.

The mere fact that the Referee's opinion was that the bankrupt had property belonging to the estate in his possession or under his control, is no indication of the quantum or degree of proof adduced on which he bases his findings.

Davidson v. *Wilson*, 286 Fed. 108 (C. C. A., 3rd Cir.) and in the case of *In re Shulman*, 177 Fed. 191 (C. C. A., 2nd Cir.) cited by the respondent in support of his contentions under this point, deal only with the proposition that the report of the Referee affirmed by the District Court should not be disturbed unless plain mistake had been made.

These cases in nowise support the respondent's con-

tention that the turnover order must be presumed to have been based upon the finding that the failure to turn over was beyond a reasonable doubt.

J.

Respondent states his thirteenth point (p. 77), that unless the bankrupt is punished for contempt upon his failure to comply with the turnover order, turnover orders would be useless except for the word 'unless'.

This point is irrelevant in these considerations. The question involved is the degree of proof necessary to show that the bankrupt has present possession and control of the property or money belonging to his estate and his ability to comply with the order.

Rose, *J.*, in *Kirsner* v. *Taliaferro* (*supra*), said:

> "We thoroughly agree with those courts which hold that, before a bankrupt may be committed for failure to obey an order to turn over property to his trustee, the court should be satisfied that he has present ability to comply. For many reasons the conviction that he has the power should be as nearly absolute as human conclusions ordinarily can be. We know no better way of stating the quantum of proof which should be insisted on than to say, as other courts have said, that it should be sufficient to establish the fact beyond reasonable doubt. Such a rule is required, not only for the protection of the liberty of the citizen, but for the preservation of the dignity of the court itself. It is not well that there should be many occasions in which, after sending a man to jail for refusing to obey an order, the Court will feel constrained to release him without the order

being obeyed. Unless the power of commitment as a means of compulsion is exercised only when there is no real question of the ability of the defendant to do what he is commanded, such an outcome will not be uncommon."

This Court said in *California Paving Co.* v. *Molitor*, 113 U. S. 609, 5 Supp. Ct. Rep. 618, 28 L. Ed. 1106:

"Process of contempt is a severe remedy, and should not be resorted to where there is a fair ground of doubt as to the wrongfulness of the defendant's conduct."

"The genius of our law requires the guilty should escape rather than an innocent man shall suffer imprisonment."

In re J. A. Small Shoe Co., 13 Fed. (2d) 143 (D. C., Conn.), at page 145.

Respectfully submitted,

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